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5 I.A.3 17

55646

ABST.

C. CASEY HOMES, INC., an Illinois Corporation and CASIMIR SOLEWSKI and LILLIAN SOLEWSKI, his wife, Plaintiffs-Appellees, vs. VILLAGE OF OAK LAWN, an Illinois Municipal Corporation, Defendant-Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. HONORABLE EDWARD F. HEALY PRESIDING.

MR. JUSTICE LYONS delivered the opinion of the court:

In this declaratory action, defendant, Village of Oak Lawn, appeals from a judgment of the Circuit Court of Cook County invalidating certain portions of the zoning ordinance of the Village as they pertain to the subject property. The property is located at the northwest corner of 101st Street and Parke Avenue in the Village of Oak Lawn and consists of approximately 3/4 of an acre. The Village classified it under R-1 zoning, a single family residence district. The judgment appealed from would permit improvement of the property with an apartment building of thirty units as authorized under R-3 zoning. Judgment was entered on September 23, 1970.

The Village filed a Notice of Appeal on October 19, 1970, and subsequently perfected its appeal to this court. Due notice of all filings and proceedings in this court was properly directed to appellees. Appellees, however, have failed to appear, answer or otherwise participate in these appellate proceedings. It is thus apparent that appellees have elected to abandon both their attack on the zoning ordinance and their desired construction project. Under such circumstances, we believe the public interest requires that the subject property be restored to its zoning status quo as determined by the Village authorities and we accordingly reverse the declaratory judgment pro forma. Drovers National Bank of Chicago v. City of Chicago, 1971, ___ Ill.App.3d ___, 273 N.E.2d 238.

JUDGMENT REVERSED.

GOLDBERG, P.J. and DUNN, J., concur.

5 I.A.3 18

55654

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	APPEAL FROM
vs.	)	CIRCUIT COURT,
	)	COOK COUNTY.
CHRISTOPHER C. RANDLE, Defendant-Appellant.	)	HON. ROBERT J. COLLINS, Presiding.

ABST.

MR. JUSTICE BURKE delivered the opinion of the Court:

Defendant was found guilty by a jury of the crime of attempt burglary and was sentenced to a term of ten years to fourteen years in the penitentiary. The Public Defender of Cook County, appointed counsel for defendant on appeal, filed a brief and abstract alleging that the sentence imposed upon defendant was excessive.

Defendant thereafter was given leave to and did file, pro se, a two-part "Supplemental Brief and Argument" in which he alleges that the assistant state's attorney improperly elicited from one of the arresting police officers evidence of whether or not the defendant made a statement at the time of his arrest; that the concluding instruction ("Forms of Verdicts") given to the jury was improper in that it denied the defendant a fair trial, eliminated the concept that he was to be tried by twelve impartial jurors, and eliminated the possibility of a "hung jury"; that the trial court improperly failed to allow defendant a reasonable opportunity to poll the jury; and that the assistant state's attorney engaged in improper argument and misstatement of the evidence before the jury.

The testimony of City of Chicago Police Officers Hill and Wojtkiewicz concerning the circumstances surrounding the commission of the offense and the arrest of the defendant was substantially

the same. At approximately 10:45 P.M. on November 9, 1969 the officers were on patrol in an unmarked police car, in the vicinity of Orchard Avenue and North Avenue in Chicago. When the officers' vehicle had turned south from Concord Place (an alleyway running north of and parallel to North Avenue) onto Orchard Avenue, the officers heard the sound of breaking glass, and the vehicle was stopped at the intersection of North Avenue and Orchard Avenue. North Avenue was well lighted at the time and no one was on the street.

About thirty seconds later the officers observed a man, later identified as the defendant, emerge from the doorway of a store at 708 West North Avenue with a crowbar in his hand. Defendant dropped the crowbar to the sidewalk, which created considerable noise, and kicked it into the gutter. The officers drove the fifty feet to where the defendant was standing and observed that the glass in the door to the store had been broken. Defendant was placed under arrest and a search revealed a pair of pliers in his coat pocket. The officers also observed pry marks on the doorway of the store, approximately equal in width to the head of the crowbar.

Defendant testified in his own behalf and denied that he attempted to break into the store. He testified that the police arrested him one-half block from the store while he was walking home. He further denied knowledge of the crowbar or the pliers.

Defendant's initial contention in his pro se "Supplemental Brief and Argument" is that the assistant state's attorney improperly questioned one of the arresting police officers concerning whether defendant made a statement at the time of his arrest, and further that the assistant state's attorney referred to such questioning during closing argument.

The matter of which defendant complains occurred on the re-direct examination of the officer by the assistant state's attorney. The officer was asked whether the defendant admitted or denied commission of the offense, to which the officer replied that he neither admitted nor denied it. However, this area of questioning was opened up by defendant on the officer's prior cross-examination, when the officer was asked by defense counsel whether defendant acknowledged to the officer that he attempted to burglarize the store. The assistant state's attorney's questioning of the officer on the subsequent re-direct examination made express reference to the prior defense questioning in that regard. Defendant himself initiated this line of questioning and cannot now be heard to complain. This view obviates defendant's argument that the assistant state's attorney improperly alluded to the officer's testimony in this regard during closing argument.

The cases cited by defendant in support of his contention are not in point: People v. Rothe, 358 Ill.52; People v. Lampson, 129 Ill.App.2d 72; People v. Novak, 84 Ill.App.2d 276.

The remaining three points raised in defendant's "Supplemental Brief and Argument" have been considered by this Court and have been found to be without merit. As to the question raised concerning the concluding instruction given to the jury, the wording thereof conforms strictly to the concluding instruction recommended by the Illinois Pattern Jury Instructions. See IPI-Criminal 26.01. The case cited by defendant is clearly not in point. See People v. Lewis, 112 Ill.App.2d 1.

As to the question of whether the trial court failed to allow the defendant a reasonable time within which to poll the jury with regard to their verdict, this contention appears to be nothing more than an afterthought on defendant's part, after the trial had been

completed, the verdict returned, the judgment entered, the jury dismissed, and the post trial motions denied. No request by defendant for such a poll appears of record, neither after the verdict had been announced and the judgment entered, nor at the subsequent hearing on the defendant's post trial motion held one month later.

Finally, as to the question of the alleged prejudicial comments of the assistant state's attorney during closing argument, those comments related primarily to defendant's past felony record and how that in turn related to his credibility as a witness, inasmuch as he testified in his own behalf at trial. As to the allegation that the assistant state's attorney misstated the evidence to the jury during closing argument, the jury heard the evidence adduced at trial and it was their function to consider counsel's statements in light of that evidence. The evidence adduced by the People overwhelmingly supports the verdict returned by the jury.

The final question presented on review is that of the alleged excessiveness of the sentence imposed, which is raised in the brief of the Public Defender.

This Court has the power to reduce a sentence, but that power must be exercised with due caution and only in a proper case, where the penalty imposed constitutes a departure from the spirit and basic purpose of the law. Supreme Court Rule 615(b)(4); People v. Taylor, 33 Ill.2d 417, 424.

The sentence imposed upon a defendant upon his conviction of a crime must not be motivated by vengeance. An excessive minimum sentence may defeat the effectiveness of the parole system by making mandatory the incarceration of the defendant long after effective rehabilitation has been accomplished. Abernathy, Sr. v. People, 123 Ill.App.2d 263; People v. Lillie, 79 Ill.App.2d 174.

From the matters brought out during the hearing in aggravation and mitigation, it appears that the defendant has a past criminal record consisting of three misdemeanor convictions, three felony convictions and, apparently, a parole violation. Five of the six prior convictions related to offenses against property, while the sixth related to unlawful use of weapons. The maximum term which the defendant received on any of the six prior offenses was three to seven years in the penitentiary, for burglary. It was brought out at the hearing that defendant was thirty-four years of age at the time of the instant conviction.

The maximum term for which the defendant could have been sentenced for the instant attempt burglary was a term of fourteen years in the penitentiary. Ill.Rev.Stat. 1969, Chap.38, Par.8-4(c)(2). It appears that the minimum term of years imposed in the instant case does not reflect the possibility of rehabilitation on defendant's part as a practical matter, in light of the defendant's age, the nature of the instant and past offenses, and the penalties imposed for the past offenses. See People v. Pantoja, ____Ill.App. 2d___(1st Dist., Gen. No. 55080, July 12, 1971.)

Under all the circumstances of this case the minimum term of years imposed should be reduced. The maximum term imposed shall stand so as to allow the parole board an adequate time period within which to determine whether the defendant has been rehabilitated to the extent that he is capable of re-entering society.

For these reasons the sentence imposed upon defendant is reduced to a term of not less than five years nor more than fourteen years in the penitentiary, and the judgment, as modified, is affirmed.

JUDGMENT MODIFIED AND, AS MODIFIED, AFFIRMED.

GOLDBERG, P.J., and LYONS, J., concur.

NO. 55188

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
vs.
SIMMON E. SMITH,
Defendant-Appellant.

APPEAL FROM CIRCUIT COURT COOK COUNTY

ABST.

HONORABLE FRANK J. WILSON, PRESIDING.

MR. JUSTICE LEIGHTON delivered the opinion of the court:

This was a prosecution for robbery and rape. Defendant waived trial by jury. After hearing the woman complainant, three police officers, and defendant as his only witness, the court found him guilty of both offenses. Defendant was sentenced to serve concurrent terms of one to ten years for robbery and four to twelve for rape. In this appeal he contends that (1) the State failed to prove his guilt beyond a reasonable doubt; (2) it was error for the trial court to convict him of two crimes arising out of the same transaction; and (3) the maximum sentences imposed were excessive.

We find no merit in these contentions.

As to the first, the record discloses that on January 4, 1970, at about 7:00 P.M., Chicago Transit Authority employees at Homan and Congress in Chicago called the police and reported that a woman was screaming for help at the "L" platform there. Three policemen responded. Two of them, Sergeant Paul Blank and Officer Peter J. Parisi, found defendant on top of the woman. Officer Parisi testified that when they seized the defendant, his pants fly was open and his penis was exposed. When the woman was freed, she said, "This man just robbed and raped me." The third police officer corroborated the testimony of the other two.

After defendant was arrested and searched, he had a twenty-dollar bill and two singles. The complaining witness testified that defendant first struck her from behind and asked her for

money. She gave him a twenty-dollar bill and two singles. Then he wanted to have intercourse with her. When she refused, he struck her. When she would not take her clothes off, he struck her and by force, compelled her to have intercourse with him. She screamed and the officers came to her aid.

Defendant, as his only witness, testified that he was acquainted with the complainant and knew her by the name of Ann. He claimed to have had intercourse with her on several occasions before January 4. He denied having robbed and raped the woman. She, on the other hand, was asked and she denied ever having seen the defendant before he attacked her on the "L" platform on January 4, 1970.

At best, defendant's testimony, contradicting that of the complaining woman, presented the trial judge with a question of witness credibility. It was the responsibility of the trial judge to answer this question. His answer, his resolution of the testimonial conflict, will not be disturbed by us unless the evidence is so unsatisfactory as to leave a reasonable doubt of the defendant's guilt. People v. Porterfield, ___ Ill. App. 3d ___, 268 N.E. 2d 537; People v. Thompson, 128 Ill. App. 2d 420, 263 N.E. 2d 124. Our review of the record convinces us that the testimony of the complaining witness, corroborated and supported by that of three policemen, proved defendant guilty beyond a reasonable doubt.

As to the second, the evidence proved that defendant first robbed the woman and then he raped her. These were separate and distinct offenses, not crimes which arose from the same conduct. The two crimes were the result of separate and distinct acts. See People v. Weaver, 93 Ill. App. 2d 311, 236 N.E. 2d 362.

As to the third, we find no reason to interfere with the sentences imposed by the trial judge. In our judgment, they

were properly proportioned to the nature of the offenses committed by the defendant. See People v. Ramey, 115 Ill. App. 2d 431, 253 N.E. 2d 688. The judgments are affirmed.

Affirmed.

Stamos, P.J. and Schwartz, J., Concur.

Publish Abstract Only.

53523

5 I.A.3 27

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

RAY RAPHIER,

Defendant-Appellant.

Appeal from the Circuit Court of Cook County.

Harry S. Stark, J.

ABST.

MR. JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT.

Ray Raphier was indicted for armed robbery. After several continuances his attorney was given leave to withdraw and new counsel was appointed. When the case came on for trial Raphier's counsel informed the court that he wished to plead guilty and was doing so without any promise as to the disposition of the case. The court advised Raphier that by entering a plea of guilty he was waiving a jury trial and informed him of the penalty that could be imposed. He persisted in his plea. The facts were presented by stipulation and he was adjudged guilty. Following a hearing in mitigation and aggravation which revealed a criminal record including incarceration for burglary and armed robbery, he was sentenced to the penitentiary for not less than 8 nor more than 14 years.

The trial court advised him that he could appeal his sentence and that if indigent an attorney and a transcript of the proceedings would be supplied him. This court permitted him to file a late notice of appeal and has appointed three successive attorneys to

represent him. The first, the public defender, after filing the record on appeal, withdrew at Raphier's request. The second, Daniel M. Schuyler, Jr., was also allowed to withdraw after the defendant asked him to do so. The third, Robert L. Manning, also has moved to withdraw.

Attorney Manning's motion, filed under the rule pronounced in Anders v. California, 386 U.S. 738 (1967), is supported by an abstract of the record and a brief which discusses the plea of guilty and all other points suggested to him by Raphier. Attorney Manning states that he has determined from the record and his correspondence with the defendant that the appeal is frivolous. Copies of the correspondence are attached to the brief.

The defendant was notified of Attorney Manning's motion to withdraw and a copy of the motion and brief were sent to him. He was informed that he could file any additional points he wished in support of his appeal. No response has been received from him.

We have read the record, considered the points raised by the defendant and examined the authorities cited in the brief. We agree with Attorney Manning that there is nothing in the record which could sustain a reversal of the defendant's conviction or a reduction of the sentence imposed. We also agree that the possible issues suggested by the defendant in his letters to Manning concerning his extradition from the State of New York and the incompetency of his trial lawyer are without substance or merit.

53523

The motion to withdraw as counsel is granted. The appeal is dismissed and the judgment affirmed.

Appeal dismissed;
judgment affirmed.

McGloon, PJ., and McNamara, J., concur.

53751

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,
vs.
FREDDIE MAE DAVIS (Impleaded), Defendant-Appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY
HON. THOMAS R. MC MILLEN, Presiding.

MR. JUSTICE BURKE delivered the opinion of the court:

On March 21, 1968, Freddie Mae Davis, Robert Harris and Lynne Thomas were indicted for the offense of armed robbery. Davis was arraigned on the 25th of April 1968 and at her request, a Public Defender was appointed to represent her. The same Public Defender also represented her co-defendants. Davis (hereinafter the defendant) and her co-defendants were tried together on the 20th of May 1968. Harris was tried before a jury while the defendant and Miss Thomas had a bench trial. The defendant was found guilty (by the trial judge) and was sentenced to a term of not less than two nor more than four years in the penitentiary. The co-defendant Harris was found guilty (by the jury) and was also sentenced to the penitentiary. Co-defendant Thomas was found not guilty. This appeal only involves the defendant, Davis.

On February 22, 1968 John Doyle was employed at Van's Drug Store. At about 10:20 that morning, Harris entered the store followed by the defendant a few minutes later. The defendant requested to purchase iron pills and when Doyle attempted to get them from the rear portion of the store, Harris, while holding a revolver, interceded in his path. At that moment, Doyle turned his head toward the defendant and observed that she was also holding a revolver. The defendant gestured Doyle toward the cash register, and after instructing him to open it, she reached in and withdrew

its contents.

Harris then ordered Doyle to open the safe which was located at the back of the store. Doyle obeyed, and allowed Harris to remove approximately $135 in paper currency plus a quantity of rolled coins. When Harris told Doyle to hand over the cocaine, Doyle replied stating that he did not have any. Doyle testified that the defendant and Harris were in the store for approximately fifteen minutes and that he was able to get a good look at them. He further stated that the lighting in the store was very good.

Officer Sidney Wilbon was called to testify on behalf of the prosecution. He stated that on the morning in question, he received a radio message describing the car which was involved in the robbery. Later that afternoon, he observed an automobile which matched this description, passing him at an excessive rate of speed. A chase ensued and Wilbon curbed the car by shooting at its wheels. When this officer got out of his squad car, he observed Harris place a revolver in the defendant's purse. This officer identified the defendant in court and stated that she had red hair at the time of the occurrence.

Officer William Storck testified that on the day in question, he was Officer Wilbon's partner and was with him at the time the defendant was apprehended. His testimony was substantially the same as Wilbon's. At the trial, Storck identified the revolver which was seized from the defendant and a second revolver which he had taken from Lynne Thomas.

In prosecuting this appeal, defendant contends: (1.) That it was improper for the trial judge to deny her motion for continuance; (2.) That the trial judge erred in denying her motion for a severance, and; (3.) That she was not proved guilty of the offense of armed robbery beyond a reasonable doubt. We will consider each of the contentions in the order presented.

The defendant requested a continuance for two reasons: First, so that she could obtain the services of a private attorney, and second, so that she could secure additional alibi witnesses.

The language of our Supreme Court in People v. Solomon, 24 Ill. 2d 586 at 589 is pertinent to this case. There it is stated:

> "The granting of a continuance to permit preparation for a case, or for the substitution of counsel, necessarily depends upon the particular facts and circumstances surrounding the request, and is a matter resting within the sound judicial discretion of the trial court. (People v. Surgeon, 15 Ill.2d 236; People v. Clark, 9 Ill.2d 46.) Before a judgment of conviction will be reversed because of the denial of such a motion, it must appear that the refusal of additional time in some manner embarrassed the accused in preparing his defense and prejudiced his rights."

Also see People v. Canaday, 49 Ill.2d 416.

Defendant urges that she should have been granted additional time to secure a private attorney due to the fact that the actions of her co-defendant, Harris, prevented her attorney from adequately representing her. Although there is evidence which indicates that Harris refused to cooperate with the Public Defender, there is no evidence indicating that these actions stifled the Public Defender in his effort to present the defendant's case. See People v. Wolff, 19 Ill.2d 318. Furthermore, it should be noted that when the defendant was arraigned on the 25th of April 1968, she did not object to the appointment of the Public Defender. The record indicates that her objection was not raised until the case came on for trial on the 20th of May 1968. See People v. Jones, 51 Ill.App.2d 391.

Regarding the defendant's request for an extension of time to secure additional alibi witnesses, it is the rule that where it does not appear that the attendance of a witness can be procured, or there is no reason given why the witness could not have been procured

on time, the request for the continuance may properly be denied. People v. Goodrich, 73 Ill.App.2d 196. In the case at bar, the defendant had approximately one month to produce her additional witnesses. Moreover, the record is devoid of any evidence which would indicate why the defendant had not been able to produce her alleged witnesses at the trial, or that if given the opportunity, they would be produced. In light of these facts, we cannot say that the trial judge abused his discretion by refusing to grant the request for a continuance.

The next contention is that the trial court erred when it refused to grant her motion for a severance. We do not agree.

When defendants are jointly indicted, ordinarily, they are tried together. People v. Meisenhelter, 317 Ill.App.511; People v. Ramey, 115 Ill.App.2d 431. As a prerequisite to the granting of a motion for severance, the movant must demonstrate how he will be prejudiced by a joint trial. The test is whether the defenses are so antagonistic to each other that a severance is necessary to insure a fair trial. People v. Canaday, 49 Ill.2d 416; People v. Grilec, 2 Ill.2d 538.

In the case at bar, the defendant has advanced two reasons in support of her motion for severance. First, that the hostile and uncooperative nature of the co-defendant, Harris, prevented a fair trial and second, that by virtue of the joint trial, she was forced to limit her testimony.

Our examination of the record here fails to disclose how Harris' uncooperative attitude prejudiced or otherwise embarrassed the defendant before the trial judge. There is nothing in the record which indicates that the alibi defense asserted by the defendant, and the defense asserted by Harris were antagonistic. See People v. Arnold,

91 Ill.App.2d 282.

Defendant's contention that the denial of a severance forced her to limit her testimony at trial is without merit and based on speculation. People v. Gendron, 41 Ill.2d 351, cert.denied, 396 U.S.889. The trial judge was correct in denying defendant's motion.

The last contention is that the in-court identification was a product of a suggestive pre-trial identification, and should have been suppressed. It is to be noted that the out of court identification was suppressed. The issue is whether the in-court identification was based on or tainted by the out of court identification. People v. Blumenshine, 42 Ill.2d 508.

We accept the People's contention that defendant's in-court identification had an origin independent of the pre-trial identification. Doyle testified that the defendant was in the store for approximately fifteen minutes and that the light there was very good. He further stated that he was able to observe the defendant for about five minutes, and that at times, she was only four feet away from him. On the basis of these facts, we conclude that Doyle's in-court identification had an origin independent of the suppressed pre-trial identification, and was properly admitted. See People v. McLemore,___ Ill.App.3d _____(Gen. No. 54993, Jan. 10, 1972).

The record supports the finding and judgment of guilty beyond a reasonable doubt and the judgment is affirmed. See People v. Harris, 46 Ill.2d 383, cert.denied. 402 U.S.972.

JUDGMENT AFFIRMED.

GOLDBERG, P.J., and LYONS, J., concur.

56500

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
vs.
JAMES E. MURRY,
Defendant-Appellant.

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.

HONORABLE R.A. HAREWOOD, PRESIDING.

MR. JUSTICE LYONS delivered the opinion of the court.

This is an appeal from an order of the Circuit Court of Cook County dismissing defendant's post conviction petition pursuant to a motion filed by the State.

On February 11, 1964, James E. Murry, then 17 years of age, entered pleas of guilty to five indictments charging him with separate offenses of rape, robbery, attempt rape, and two offenses of attempt robbery. Judgments were entered on the pleas and he was sentenced to concurrent terms in the Illinois State Penitentiary as follows: 25 to 50 years for the rape, 20 to 40 years for the robbery, and 10 to 14 years for each attempt robbery and the attempt rape.

Defendant's first contention on appeal is that the dismissal of his post conviction petition was error since the record discloses that the trial court abused its discretion by failing to conduct a competency hearing on its own motion prior to accepting the pleas.

The Circuit Court is not required to conduct a hearing into competency of the accused unless facts sufficient to create a bona fide doubt as to his competency come to the attention of the court. The question of whether a bona fide doubt does exist is largely within the discretion of the trial judge. People v. Southwood, 1971, 49 Ill.2d 228, 274 N.E.2d 41; People v. Franklin, 1971, 48 Ill.2d 254, 269 N.E.2d 479.

Defendant asserts that the following circumstances, which

appear of record and were known to the trial court at the time his pleas were accepted, create such a doubt: (1) his youth, (2) the fact that all of the offenses with which he was charged occurred within a period of one week, (3) a medical history given by the public defender which indicated that he had been in a severe accident when young and had also suffered a severe injury, (4) his affirmation that he had told the public defender that he did not know why he had committed the sex related offenses as his mind had gone blank, and (5) the suggestion by the public defender that he believed that defendant was in need of psychiatric care.

While certain of these circumstances pointed out by defendant must at least be considered out of the ordinary, we do not agree that when considered either singly or collectively they establish a bona fide doubt as to his competency. Thus we must conclude that the trial court did not abuse its discretion in failing to conduct a competency hearing and that the Circuit Court was therefore correct in dismissing the post conviction petition.

Defendant's second and final contention relates to the length of the sentences imposed. Proceedings under the Post Conviction Hearing Act (Ill. Rev. Stat. 1969, Ch.38, par.122-1 et seq.) are limited to consideration of the question of whether the proceedings which resulted in the petitioner's conviction were tainted due to a substantial denial of his constitutional rights. Questions relating to the severity of the sentence imposed are not addressed to the proceedings which resulted in the conviction of the petitioner and are therefore not properly within the scope of permissible inquiry under the Post Conviction Hearing Act.

JUDGMENT AFFIRMED.

GOLDBERG, P.J. and BURKE, J., concur.

71-117

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

ABST.

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, in the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable WILLIAM L. GUILD, Acting Presiding Justice
Honorable THOMAS J. MORAN, Justice
Honorable MEL ABRAHAMSON, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On May 10, 1972 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

NO. 71-117

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS Plaintiff-Appellant and JACK HOOGASIAN, Contemner-Appellant -vs- ROBERT COLLIER, Defendant-Appellee	Appeal from the 19th Judicial Circuit Hon. Thomas R. Doran Magistrate presiding

MR. JUSTICE GUILD delivered the opinion of the court.

The State's Attorney of Lake County refused to furnish defense counsel "all statements of any witnesses" and "all reports and memorandum by and of any witnesses" as he was ordered to do prior to trial. The defendant had been charged by a complaint only with the offense of theft under $150. The defendant had not been indicted nor had an information been filed against him. This all occurred prior to the effective date of Supreme Court Rule 412 providing for discovery in criminal cases.

Prior to the adoption of Supreme Court Rule 412, the then applicable rule of law had been developed in People v. Moses, 11 Ill. 2d 84, 142 N.E.2d 1 (1957), People v. Wolff, 19 Ill. 2d 318, 167 N.E.2d 197 (1960), and the line of cases following them. In People v. Turner, 29 Ill. 2d 379 at 383, 194 N.E.2d 349 (1963), the Court said it was well settled that the use of police reports and similar documents by the defense is restricted to impeachment. People v. Allen, 47 Ill. 2d 57 at 59, 264 N.E.2d 184 (1970) stated the following:

> "The prosecution on demand is required to furnish an accused for possible impeachment use specific statements in its possession or control which were made by a State's witness, which have been shown to exist and which are in the witness' own words or substantially verbatim." (Emphasis supplied.)

The only earlier exception to this rule was the duty of the State to disclose any evidence favorable to the accused and material to his guilt or punishment. Brady v. Maryland, 373 U.S.83 at 87, 83 S.Ct. 1194 at 1196-97 (1963). The Committee Comment to Supreme Court Rule 412, Paragraph (c) (Smith Hurd Annotated, Ch. 110A, §§ 412 (c)), states that "although the pretrial disclosure of such material is now not constitutionally required it is clear that, if a conviction is to be valid, the material must be disclosed so that the defense can make use of it." No issue of favorable evidence is raised here, however, and no such demand was included in the defendant's discovery motion.

We find that the order of the Magistrate finding the State's Attorney of Lake County in contempt for refusing to comply with the order of the trial court was error. No statute or rule of case law on the date of the alleged contempt herein, authorized the granting of pre-trial discovery sought by the defendant.

We note in passing that even had the Supreme Court Rules on discovery in criminal cases then been in effect, defendant would not have benefited from them as the charge against him was brought by complaint. Rule 411 limits application of discovery, providing among other things, that the procedure shall become applicable following indictment or information.

REVERSED AND REMANDED WITH DIRECTION TO VACATE ORDER OF CONTEMPT AND FINE AND TO PROCEED CONSISTENTLY WITH THIS OPINION.

J. ABRAHAMSON and J. MORAN Concur.

71-280

05 I.A.3 209

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

ABST.

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, in the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable WILLIAM L. GUILD, Acting Presiding Justice
Honorable THOMAS J. MORAN, Justice
Honorable MEL ABRAHAMSON, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On May 10, 1972 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

NO. 71-280

Abstract

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FILED

MAY 10 1972

HOWARD R. KELLETT, Clerk
Appellate Court, 2d District

PEOPLE OF THE STATE OF ILLINOIS Plaintiff-Appellee -vs- DARRELL WAYNE BARKER Defendant-Appellant	Appeal from the 17th Judicial Circuit Hon. Albert S. O'Sullivan Judge presiding

MR. JUSTICE GUILD delivered the opinion of the court.

The defendant represented by an attorney from the Illinois Defender Project filed the instant appeal. Counsel for the defendant has now petitioned for leave to withdraw from the case.

The defendant was charged with burglary, waived prosecution by indictment, and upon a plea of guilty was sentenced to 1-5 years in the State Penitentiary after his application for probation was denied.

Defendant in his application for probation testified in his own behalf and admitted that after he was released on bond for the first burglary that he in fact committed a second burglary in which he stole keys from the Central Plastic Distributing Company together with a check writer and checks. He admitted that the keys were stolen for the purpose of pilfering vending machines of the Central Plastic Company and that he had forged several checks on that company which have been cashed. He was apprehended in Indiana and returned to Illinois by the Sheriff of Lake County.

Appellate counsel states that he has examined the record and that the appeal herein is wholly frivolous and without merit. In accordance with the procedure set forth in Anders v. California, 386 U.S.738 counsel has submitted the common law record and transcript of proceedings and has filed a brief in support of his motion.

From our examination of the record we agree that the appeal is wholly frivolous and without merit. While the defendant was

seventeen years old at the time of the instant offense he admitted to the court that he had committed an additional burglary, forgery and theft of a motor vehicle with which he left the State of Illinois. Under the circumstances a sentence of 1-5 years is not excessive. The motion for leave to withdraw is granted and judgment below is affirmed.

AFFIRMED.

J. MORAN and J. ABRAHAMSON Concur.

55485

BETTY JO WOODLEY, Plaintiff and Counter-Defendant-Appellee, vs. ROBERT EARL WOODLEY, Defendant and Counter-Plaintiff-Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. Hon. Glenn T. Johnson, Presiding.

MR. PRESIDING JUSTICE GOLDBERG delivered the opinion of the court:

Betty Jo Woodley (plaintiff) sued for divorce on grounds of mental cruelty. Robert Earl Woodley (defendant) filed a counterclaim for divorce on grounds of desertion and mental cruelty. The parties were married on January 20, 1961. No children were born to the parties as a result of the marriage. On September 4, 1970, after a complete and contested hearing without a jury, the court entered a decree of divorce in favor of plaintiff. The decree also dismissed the counterclaim for legal insufficiency on the grounds of desertion and denied its prayer for relief on grounds of mental cruelty. Defendant appeals to this court raising the single contention that the proof was insufficient to establish the statutory grounds of mental cruelty. No point of any kind is raised by defendant regarding the property settlement contained in the decree or the attorney's fees allowed.

No error of law appears from this record and none is urged by the parties. There is substantial evidence in the record to support the allegations of the complaint and to establish the statutory grounds of mental cruelty, as required by the decided cases. Howison v. Howison, 128 Ill.App.2d 377, 381, 262 N.E.2d 1, citing Hayes v. Hayes, 117 Ill.App.2d 211, 254 N.E.2d 288 and

Stanard v. Stanard, 108 Ill.App.2d 240, 247 N.E.2d 438. On the other hand, there is conflicting evidence in the record tending in some respects to refute plaintiff's theory and to show that defendant was not guilty of mental cruelty.

Under these circumstances, the issue is one for the trier of fact to determine the credibility of the witnesses and thus to resolve the conflicts in the evidence. Where the evidence is merely conflicting, we will not substitute our judgment for that of the trial court. Curran v. Curran, 19 Ill.2d 164, 169, 166 N.E.2d 13; Sawchyn v. Samlow, 109 Ill.App.2d 363, 370, 248 N.E.2d 763.

We, therefore, conclude that the decree appealed from is not against the manifest weight of the evidence. An opinion in this case would have no precedential value. The decree of divorce is affirmed.

This opinion is filed pursuant to Supreme Court Rule 23, effective January 31, 1972. Ill.Rev.Stat., ch.110A, par.23.

Decree affirmed.

BURKE, J. and LYONS, J. concur.

55612)
55703)

R. J. HARMS, d/b/a R. J. HARMS TRUCKING & EXCAVATING, Plaintiff-Appellant, vs. BEN OLSON, Defendant-Appellee.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. Hon. James L. Henry, Presiding.

MR. PRESIDING JUSTICE GOLDBERG delivered the opinion of the court:

R. J. Harms, doing business as R. J. Harms Trucking and Excavating (plaintiff) was retained by Ben Olson (defendant) as a subcontractor in connection with a project being built by defendant as general contractor in Dolton, Illinois. In a written proposal, duly accepted, plaintiff agreed to furnish all necessary fill, and also sand fill, at specified prices and to spread and place the fill at the project. Performance of the subcontract was not completed but was suspended by defendant. In plaintiff's action to recover moneys due for material furnished and labor supplied, together with loss of anticipated profits, the trial court, after a bench trial, allowed plaintiff $897 for sand fill admittedly supplied by plaintiff and $358.50 for equipment and equipment operator rental; being a total of $1255.50, and entered judgment for that amount in favor of plaintiff. The court refused to allow plaintiff $1590 for necessary fill supplied and $600 for loss of profits on the unperformed balance of the contract. Plaintiff appeals for inclusion of these items. The only contention advanced by plaintiff is that the finding of the trial court is against the manifest weight of the evidence. No question of law is involved.

The trial court accepted defendant's theory as alleged in his answer; namely, that the fill furnished by plaintiff was inferior so that much of it had to be removed and replaced by defendant. Plaintiff testified that he was to supply sand fill for the area inside of the building foundation and clay fill for the area outside of the foundation, to bring the parking lot up to grade. Plaintiff testified that he obtained all of the sand from a sandpit in Calumet City. He obtained the clay from an excavation being made for the basement of an apartment building at 148th Street and Indiana Avenue and also from a stripping operation being carried on for removal of surface clay to expose a vein of clay material used for making bricks.

Plaintiff further testified that he inspected the premises prior to the making of any delivery thereon and that he found a quantity of fill which was basically clay material but which contained broken brick, concrete and wood. The evidence is that this was not suitable as a basis for the necessary paving on the parking lot. Plaintiff further testified that defendant never at any time objected to the quality of the fill but only to the amount of fill for which plaintiff had billed him. Plaintiff testified that he had supplied 1590 cubic yards of fill in addition to the sand fill for which the court granted him an allowance. He also testified that proper performance of his contract would have required an additional 1000 yards of fill which he was not permitted to furnish and that his profit in this regard, reasonably calculated, would have been $600.

Plaintiff's testimony is corroborated by a contractor working on an adjacent project who was apparently completely disinterested. He testified that he saw defective fill at the rear end of the property before plaintiff had commenced his work. Plaintiff's office manager testified that she had a telephone

conversation with defendant after he had delayed payment of invoices for material and labor supplied and that defendant said nothing to her regarding quality of the fill supplied but only complained about the quantity for which he was billed. An employee of plaintiff who did the work in spreading the fill at the project, corroborated plaintiff's testimony regarding the source of all fill supplied by plaintiff and also testified that defendant had never at any time complained about the quality of this fill. This witness also testified that before any fill was delivered by plaintiff, he saw a quantity of defective fill at the rear of the lot and that defendant instructed him to use this substance on the job.

Defendant denied the testimony of plaintiff regarding quality of the fill. He asserted that he told plaintiff about defects in the fill in the presence of his own foreman. The foreman did not testify. Defendant testified that he retained the R. W. Collins Company to remove some of the old fill and to replace it and that he paid them some $600. However, he also testified that he did not know how much of the fill had been removed and how much had been replaced. He also testified that he purchased additional fill from another source. However, all of this evidence remains entirely uncorroborated. Defendant also called the qualified architect retained by the owner. This person testified that he had visited the site and corroborated the evidence of defective fill being present there. He did not testify as to who had placed this substance upon the property.

Upon analysis of all of the evidence and consideration of the arguments raised by respective counsel, we have concluded that the finding of the trial court is contrary to the manifest weight of the evidence. It is our opinion that the evidence supports completely plaintiff's theory that the defective fill was

placed upon the property by persons unknown to plaintiff and was not supplied by him. We find accordingly that plaintiff is entitled to recover for fill actually supplied by him, for which payment was not received, in the amount of $1590 and an additional sum of $600 representing plaintiff's reasonable profit on additional fill which defendant refused to accept; a total additional sum of $2190.

The judgment entered in favor of plaintiff is, therefore, modified by increasing the amount thereof by an additional sum of $2190 to $3445.50; and, as modified, the judgment is affirmed.

Judgment affirmed as modified.

BURKE, J. and LYONS, J. concur.

55693

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. KENNETH FREEMAN, Defendant-Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. HONORABLE CHESTER A. STRZALKA, PRESIDING.

MR. JUSTICE LYONS delivered the opinion of the court:

Following a bench trial, defendant, Kenneth Freeman, was found guilty of attempt theft of property valued at $60.00. Ill. Rev. Stat. 1969, ch.38, pars. 8-4, 16-1. He was sentenced to ninety days in the County Jail. On appeal, he contends that he did not knowingly and understandingly waive his right to trial by jury.

The common law record in this case shows that defendant was duly advised by the court as to his right to a trial by jury, that he elected to waive trial by jury and that the cause was submitted to the court for trial without a jury by agreement between the parties in open court. The cause proceeded to trial upon a complaint filed August 14, 1970, alleging that the offense was committed on or about that same date. The duly certified report of proceedings shows that defendant appeared in open court with his counsel, an attorney from the office of the Public Defender of Cook County, on August 21, 1970. The court inquired whether the cause was ready for trial. The defendant himself answered that he was ready. Defendant's attorney then stated: "There will be a plea of not guilty * * * Waive jury; trial by this court." The court next proceeded to hear testimony. The record does not contain a written waiver of jury trial signed by defendant.

In People v. Gay, No. 55698 (Ill. App., filed March 20, 1972), this court was faced with an identical issue on essentially

identical facts. In Gay we reviewed numerous authorities, most of which the instant defendant relies upon, and concluded that a knowing and understanding jury waiver had been made. To review those same authorities here would serve no useful purpose. We elect instead to base our decision upon the strength of those principles set out in Gay and we accordingly affirm the judgment of the circuit court.

JUDGMENT AFFIRMED.

GOLDBERG, P.J. and BURKE, J., concur.

56821

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,
vs.
JAMES M. BEHNING, Defendant-Appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

HON. FRANCIS T. DELANEY, Presiding.

MR. JUSTICE BURKE delivered the opinion of the court:

On May 29, 1969, James M. Behning, the petitioner, pleaded guilty to three indictments charging theft of property having a value in excess of $150.00, and two indictments which charged bail jumping. Behning was represented by a Public Defender. The plea was accepted and the petitioner was thereafter sentenced to a term of not less than three, nor more than three years and a day in the penitentiary. There was no appeal.

The petitioner thereafter filed a post-conviction petition pursuant to the Post-Conviction Hearing Act (Ill.Rev.Stat., 1969, ch. 38, sec. 122-1 et.seq.) A Public Defender was appointed to represent him and on the 25th of August 1970, the petition was dismissed.

Citing Boykin v. Alabama, 395 U.S. 238, Petitioner contends that it was error for the trial judge to accept his guilty plea without first advising him of his right to confront his accusers, and of his privilege against self-incrimination. (See People v. Williams, 44 Ill.2d 334, cert. denied 399 U.S. 914, wherein the court held that the requirements of the Boykin decision are not to be applied to pleas of guilty entered prior to June 2, 1969.) The petitioner also contends that the trial judge erred by failing to determine that there was a factual basis for the plea.

The pertinent portions of the change-of-plea proceedings are as follows:

> THE COURT: "Mr. Behning, you have heard your attorney, the Public Defender, advise me that at this time you are changing your plea of not guilty to all of these indictments to one of guilty, is that correct, sir?"

DEFENDANT BEHNING: "Yes, your Honor."

Q. "Do you know that when you plead guilty you automatically waive your right to a trial by me or anybody else, or twelve people in that jury box, you get no trial whatsoever?"

A. "Yes, sir."

Q. "Knowing and understanding that do you still persist in your plea of guilty?"

A. "Yes, your Honor."

Q. "Before accepting your plea it is my duty to advise you that under your pleas of guilty to these indictments and the various counts thereof I may sentence you as follows: on indictment 66-674 wherein you are charged with the crime of theft in that you obtained unauthorized control over a truck valued in excess of $150.00, I may sentence you to the Illinois State Penitentiary under that indictment for not less than one year and for not more than ten years. Do you understand that, sir?"

A. "Yes, your Honor."

Q. "On Indictment number 66-675 wherein the first count of said indictment you are charged with theft of an automobile from Arlington Park Dodge valued in excess of $150.00, under that first count of said indictment I may sentence you to the Illinois State Penitentiary, since the value of the property is in excess of $150.00, for any term of years not less than one and not more than ten. Do you understand that, sir?"

A. "Yes, your Honor."

* * *

Q. "In this third indictment, 67-2039 wherein you are charged with the theft of a vehicle having a value in excess of $150.00, I may likewise sentence you to the Illinois State Penitentiary under said count of said indictment for any term of years of not less than one nor more than ten, do you understand that, sir?"

A. "Yes, sir."

* * *

THE COURT: "Under the fourth indictment, 67-3673, you are charged with the offense of jumping bail involving the property involved in indictment number 67-2039, and under said count of said indictment I may fine you not more than $5,000.00 or imprison you in the State Penitentiary for not more than five years or I may so fine you and imprison you. Do you understand that, sir?"

A. "Yes, your Honor."

Q. "And on the fifth indictment, 68-3939, in said indictment you are charged with jumping bail with reference to indictment number 66-674 and 66-675 and 67-2039--or, rather, 67-2039 and 67-3673, wherein you are charged with jumping bail in regard to those four indictments, I may likewise sentence you--may likewise fine you not more than $5,000.00 and imprison you in the Illinois State Penitentiary for not more than five years or I may both fine and imprison you. Do you understand that?"

A. "Yes, sir."

Q. "Do you further understand with reference to guilty pleas on each of these indictments I may make them all consecutive and not concurrent?"

A. "Yes, sir, your Honor."

Q. "And knowing and understanding that do you still persist in your guilty pleas?"

A. "Yes, sir, your Honor."

The case of People v. Mendoza, 48 Ill.2d 371, is pertinent to the first two contentions raised by the petitioner. At 48 Ill.2d 371, 373-4, the court stated:

"It is argued, . . .that since defendant was not similarly admonished, on the record, that he was simultaneously waiving additional constitutional rights, including the privilege against self-incrimination and the right to confront his accusers, the waiver of these rights was not voluntary and intelligent.... The free and voluntary character of defendant's plea, as disclosed in this record, is uncontradicted by factual allegations in the petition or by accompanying affidavit. The fact that defendant was not specifically admonished by the court, on the record, as to each and every consequence of his plea does not sufficiently demonstrate that he was, in fact, unaware of these consequences. At the time defendant entered his plea he was represented by privately retained counsel and it is not alleged that his counsel failed to adequately advise him of the consequences of a guilty plea."

* * *

"In view of the absence of evidence in the record or by affidavit supporting defendant's claim that he did not understand the consequences of his plea, and the failure to explain such absence, we find the petition insufficient to require a hearing and its dismissal justified."

In the present case, as was the situation in Mendoza, the trial

judge specifically advised the petitioner of his right to a trial by jury, of the nature of the offenses, and of the possible sentences which could be imposed. Furthermore, and as was the situation in Mendoza, the record is devoid of any evidence which would demonstrate that the petitioner's guilty plea was not understandingly made.

As to the claim that the trial judge erred by failing to determine that there was a factual basis for the plea, the court in People v. Nardi, 48 Ill.2d 111, held that this is not constitutionally mandated. Furthermore, Supreme Court Rule 402(c) (Ill.Rev. Stat., 1970, ch.110A, sec. 402(c)) which requires the court to determine that there is a factual basis for the plea, was not in effect at the time this petitioner entered his plea.

We conclude that the court was correct in denying the relief requested in the post-conviction petition. The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

GOLDBERG, P.J., and LYONS, J., concur.

71-182

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, in the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice
Honorable MEL ABRAHAMSON, Justice
Honorable WILLIAM L. GUILD, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On May 16, 1972 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

NO. 71-182

Abstract

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS Plaintiff-Appellant -vs- JOHN H. KING Defendant-Appellee	)	Appeal from the 18th Judicial Circuit Hon. George Borovic Jr. Judge presiding

MR. JUSTICE GUILD delivered the opinion of the court:

The People of the State of Illinois filed a complaint against John H. King for wilful failure to file a state income tax return which was amended to charge a violation of the Illinois Income Tax Act, Ill. Rev. Stat. Sec. 13-1301, Chap. 120 which defines the offense and sets forth the punishment for failure of a person to file such a return.

Upon motion of the defendant the cause was dismissed by the trial court and the State has appealed.

Sec. 13-1301 of the Income Tax Act, supra, specifically provides that any person who wilfully fails to file a return shall in addition to other penalties be guilty of a misdemeanor. Sec. 15-1501 (a) (16) defines "person" in this Act, viz,

> "The term 'person' shall be construed to mean and include an individual, a trust, estate, partnership, association, firm, company, corporation or fiduciary."

As a matter of interest, Sec. 10-1001 of the same Act provides for penalty for the failure to file tax returns where the act was not due to wilful neglect. Sec. 10-1002 immediately following, sets forth the penalty for failure to collect, account for, and pay over the tax but does not cover failure to file tax returns. In Sec. 10-1002 the definition of "person" is spelled out as follows:

> ". . .For purposes of this subsection, the term 'person' includes an individual, corporation or partnership, or an officer or employee of any corporation (including a dissolved corporation), or a member or employee of any partnership, who as such officer, employee or member is under a duty to perform the act in respect of which the violation occurs."

It is to be specifically noted that there is no such statutory provision for failure to file a tax return.

The State first contends that the matter can only be dismissed upon statutory grounds as set forth in Ill. Rev. Stat, Chap. 38, Sec. 114-1 (1969). This statutory provision does in fact under sub-section (10) provide:

> ". . .the defendant is misnamed in the charge and the misnomer results in substantial injustice to the defendant."

It is patently obvious that when a completely wrong person is named as a party defendant that no statutory provision is necessary for a motion to dismiss that party. As an example, if the wrong person is charged with the commission of any crime it does not require a statutory provision for him to be dismissed as a party defendant.

John H. King is an individual and was named as the party defendant. The complaint does not set forth the name of the corporation which was only discovered upon the filing of a demand for a bill of particulars, when the State then advised the defendant that there was a corporation by the name of Basic Machinery and Engineering Company, Inc. The record does not disclose that any proof was adduced that Mr. King was an officer of the corporation except by the statement of Mr. King's attorney that he was Chairman of the Board. The State contends that under the provisions of the criminal code, Ill. Rev. Stat. Chap. 38, Sec. 5-5A (1969):

> "(a) A person is legally accountable for conduct which is an element of an offense and which, in the name or in behalf of a corporation, he performs or causes to be performed, to the same extent as if the conduct were performed in his own name or behalf."

that John H. King was accountable for the acts of, or failure of the corporation to act. The State further properly points out that an "act" is defined as that which "includes a failure or omission to take action." Ill. Rev. Stat. Chap. 38, Sec. 2-2 (1969).

The court dismissed the cause of action on the motion of the defendant. Ill. Rev. Stat. Chap. 38, Sec. 5-4 (1969) deals with the responsibility of the corporation for criminal acts. The Committee Comment reads in part as follows:

> ". . .Thus, if the corporation is required to file a corporate report and fails to do so, the liability it will suffer may only be criminal liability. These provisions, of course, do not in any way relieve the individual corporate employees from criminal liability for their own acts. In many cases, criminal prosecution directed to the guilty individual will prove more effective in enforcing the regulatory policy of the statute. There may be times, however, in which, while it is clear that someone in the corporate employ has committed the criminal act, it may be impossible to identify the particular employee guilty of criminal behavior."

We agree with the following statement pertaining to the situation here, as stated in Wharton's Criminal Procedure, Vol. 4, Sec. 1780 at page 594:

> "When the act charged against the defendant is a criminal offense only when committed by a person acting in a specific capacity, the indictment must charge that the defendant committed the act while acting in such capacity but extreme technical nicety is not required in this respect. It has been held sufficient if the fact is definitely stated in some part of the indictment other than the charging clause." (citations)

There is no question but that an officer of the corporation, named as such, may be sued for the acts or omissions of the corporation.

In the instant case the State singled out Mr. King individually as a party defendant without naming him as an officer of the corporation or setting forth any relationship he may or may not have had with the corporation in question and filed a complaint against him. This court does not believe that under the pertinent statutory provisions set forth above that an individual may be held criminally accountable for failure of a corporation to comply with the statute where no relationship to the corporation is set forth in the complaint. The complaint was properly dismissed.

Judgment affirmed.

P.J.SEIDENFELD and J.ABRAHAMSON Concur.

55786

I.A. 3 420

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. HAROLD OWENS, Defendant-Appellant.

APPEAL FROM CIRCUIT COURT COOK COUNTY. HON. KENNETH E. WILSON, Presiding.

ABST

MR. JUSTICE BURKE delivered the opinion of the court:

Defendant was found guilty at a bench trial of the crime of murder and was sentenced to a term of fifteen years to twenty-five years in the penitentiary. He appeals.

Carter Russell testified for the People that on January 31, 1970, the witness, Richard O'Neil and a man identified only as "Curt" left their place of employment at 6:45 P.M. and proceeded to O'Neil's residence at 86th Street and Loomis Avenue in Chicago. The witness testified that they remained at O'Neil's home approximately two hours, after which they visited cocktail lounges at 87th Street and Western Avenue and at 79th Street and Loomis Avenue. The three men then went to the Surf Side Six cocktail lounge on West 63rd Street in the city. The witness testified that he had nothing alcoholic to drink that evening, and that although O'Neil did have something alcoholic to drink, neither O'Neil nor Curt was intoxicated.

Russell testified that upon entering the Surf Side Six lounge, O'Neil and Curt went to a room at the rear of the premises while the witness remained in the main body of the establishment. He stated that at about 11:15 P.M. O'Neil came from the back room and had a conversation with the witness. He testified that he (the witness) then went outside, looked around the street, and returned inside and spoke to O'Neil. O'Neil then moved five or six feet away from the witness, whereupon a group of six or seven

men entered the lounge. The men in the group walked to the rear of the establishment, returned to where O'Neil was standing, and one of the men in the group pointed out O'Neil. Another of the men in the group, identified at trial by the witness as the defendant, drew a handgun from inside his clothing, and pointed it at O'Neil. Russell testified that the gun misfired twice, the witness stating that he heard two "clicks," after which he heard four gunshots ring out. He stated that he "panicked" and dropped to the floor. Russell testified that he observed O'Neil back up after the shooting stopped and fall to the floor, exclaiming, "Oh, God help me. Take care of my car," and repeating "Oh, God help me." O'Neil was taken to a hospital by the police, where he died of his wounds on February 6, 1970. It appears from the record that no words were exchanged between any of those involved in the incident from the time the group of men entered the lounge until the shooting occurred.

Russell testified that he viewed photographs at the police station the day following O'Neil's death. At that point the defense made a motion to suppress the witness' testimony relating to his photograph and line-up identifications of the defendant. The trial of the cause was thereupon postponed and a hearing on the motion was held.

At the hearing on the motion to suppress, Chicago Police Officer Gerald Slattery testified that he spoke to Carter Russell on February 7, 1970 and that Russell described the assailant as "male Negro, seventeen or eighteen years, about five foot eight, five foot nine; hundred and forty, hundred and fifty pounds, and was wearing a tan overcoat at the time of the shooting,

and he was medium brown complexion, fairly light." The officer testified that Russell was shown a group of eighteen photographs, among which was the defendant's photograph, and that Russell looked through the entire group and identified the photograph of the defendant as the assailant.

The officer further testified that the reason defendant's photograph was included in the group was that the police had information, from sources other than Russell, that defendant was a suspect in the shooting. He stated that the photographs were chosen roughly for the physical similarities and ages of the persons portrayed in the photographs. Specifically, the officer testified that he deliberately chose a photograph of a man named Douglas Streeter, who bore a striking resemblance to the defendant, to include in the group; the officer testified that, to his knowledge, Russell viewed Streeter's photograph along with the others.

Defendant testified at the hearing that he was arrested at his home on February 8, 1970, that he was taken to the police station, and that he was placed in a line-up with five or six other men. He testified that he did not recall who those other people were, but he did recall that he was lighter complected and taller than the rest and that they were physically heavier than he. He further stated that he requested that he be allowed to see an attorney prior to the line-up, but the request was denied. Two photographs taken of the February 8th line-up were identified by the defendant as accurately portraying that line-up.

At the close of the hearing on the motion to suppress, defense counsel withdrew the motion as to the identification made

from the group of photographs, giving as his reason the inclusion of the Streeter photograph in the group. The court sustained the motion as to the line-up identification, the court's ruling being based primarily upon the photographs taken of the line-up which revealed that defendant was in fact lighter complected and taller than the others in the line-up and that the others were also physically heavier than the defendant.

Direct examination of the People's witness Carter Russell then continued, and he stated that prior to viewing the group of eighteen photographs, he viewed a book containing a large number of photographs but that he did not identify any photograph from the book.

On cross-examination Russell testified that he did not recall whether the assailant wore a hat on the night in question, that the assailant was approximately two feet away from O'Neil when the shooting took place, and that the witness observed the assailant draw the weapon from inside his belt. Russell stated that when he saw the weapon he "panicked," which he explained to mean that he became "scared." The witness further testified that he did not observe the hair style of the assailant, but in a statement given to the police after the shooting he stated that the assailant wore his hair in a "natural style."

For the defense Mrs. Emera Hagan testified that she resided with her six children in a single family bungalow located at 6043 South Throop Street in Chicago. She testified that she knew the defendant, and that on January 31, 1970 the defendant was in the basement of her home visiting with one of her daughters, Neidra Hagan. The witness testified that the defendant arrived at the Hagan residence about 6:00 P.M. on that date, that her

daughter arrived home shortly thereafter, and that defendant did not leave the Hagan home at any time between 6:00 P.M. that evening until 1:00 A.M. the following day.

On cross-examination Mrs. Hagan testified that defendant was Neidra's boyfriend and that they had known each other since grammar school. She testified that defendant and Neidra were in the basement of the Hagan home on the day in question playing records and dancing, that she did not know how many of her daughter's friends were there, and that the children were "coming up and down" from the basement. She further testified that there was an entrance/exit to the basement directly from the outside, and that it was not necessary to pass through the first floor of the house to gain access to the basement. The witness stated that she spent part of the evening in bed, and that she would periodically get up and go to the kitchen and into the basement to see what the children were doing. Mrs. Hagan stated that she went to the basement at 9:00 P.M. and again at 11:00 or 11:30 P.M. to wash clothing. She further stated that her daughter, Neidra, was in the courtroom during the trial, that the witness did not talk to defense counsel prior to the trial, and that she was quite certain that Neidra had not spoken to the defense counsel prior to trial.

Defendant testified in his own behalf and stated that on January 31, 1970 he was in the basement of the Hagan home at 6043 South Throop Street from 6:00 P.M. until 1:00 the following morning. He testified that he did not have a gun; that he did not shoot anyone; and that he did not go to the Surf Side Six lounge on West 63rd Street on the night in question. He stated that he was wearing a black leather jacket on that day, and that

he did not own a tan overcoat.

On cross-examination the defendant stated that he heard the prior testimony of Mrs. Hagan at trial; the witness expressly contradicted Mrs. Hagan's testimony in various minor details. He further testified that at about 10:00 or 10:30 on the night in question he ate part of a sandwich made by Neidra's brother, and that he was with Neidra most of the evening. Defendant testified that Neidra was in the courtroom on the day of the trial, and he stated that he did not recall talking to her about the events of January 31, 1970 after that day. On re-direct examination the defendant stated that Mrs. Hagan was in the basement washing and drying clothes, and that he did not leave the basement at any time that evening.

It was stipulated between the People and the defendant that a Coroner's pathological report be received into evidence showing that Richard O'Neil died of gunshot wounds received on January 31, 1970. There is further evidence in the record that the shooting occurred at a lounge located at 1502 West 63rd Street and that the lounge was located approximately three blocks from the Hagan residence.

Defendant initially contends that he was not proven guilty beyond a reasonable doubt. We disagree.

The testimony of a single witness, if positive and the witness credible, is sufficient to sustain a conviction. People v. Tribbett, 41 Ill.2d 267. This is true even where the defense of alibi is raised. People v. Stringer, 129 Ill.App.2d 251.

The trial court in the instant case expressly found that the occurrence witness, Carter Russell, was "clear, convincing, positive and credible in his testimony. He was so unshaken that he was not impeached." The People's evidence was that Russell

was standing eight or nine feet from the assailant at the time of the shooting. He saw one of the men in the group which confronted O'Neil point out the victim and then observed the defendant draw a gun from his belt beneath his overcoat. The witness heard the gun misfire and then heard four shots emanate from the weapon. Although the witness stated that he "panicked" when he saw the gun, which he explained as meaning that he "became scared," it is clear from the record that he maintained his presence of mind as evidenced by his testimony as to the number of shots which were fired at the victim, which in turn was substantially corroborated by the Coroner's pathological report. Russell further gave a description of the assailant to the police, and it appears that he did not hesitate in choosing defendant's photograph out of the group of eighteen photographs shown to him at the police station. There was sufficient evidence adduced by the People from which the trier of fact could find the defendant guilty beyond a reasonable doubt.

The cases cited by the defendant in support of his contention are inapposite on their facts from the case at bar. See People v. Nemes, 347 Ill.268; People v. Cullotta, 32 Ill.2d 502; People v. Reed, 103 Ill.App.2d 342; People v. Thompson, 121 Ill.App.2d 163.

Defendant next contends that the trial court improperly placed the burden upon him to establish alibi.

At the close of the defendant's case the prosecuting attorney commented to the court that he desired to hear from the defendant's girlfriend, Neidra Hagan, but that he was not inclined to vouch for her credibility, and he requested that the

court call her as a court's witness. The court denied the request, stating that either the People or the defendant could call her as a witness, but that the court would not.

During his comments preceding the finding of guilty, the trial court stated that the "burden assumed by the defendant as to put on his defense of alibi (sic)" was the defense put on by the defendant in light of the "clear and convincing" testimony given by People's witness Russell. The court went on to state that defense witness Hagan, whom the court noted admitted from the stand, was "in and out of the area where defendant was," and further commented that "the witness that was supposedly with the defendant by the defendant's own testimony most of the time was not presented." The court concluded that it took that circumstance into consideration and stated that "in considering the totality of the evidence" the court was of the opinion that the People proved its case beyond a reasonable doubt. Viewing the court's comments in the context of all his remarks preceding the finding of guilty, it is clear that the court did not place the burden of proof upon the defendant, but that the court merely reflected that defendant failed to call the one person with whom defendant claimed to have been during the time spent in the basement of the Hagan home on the night in question.

In People v. Williams, 40 Ill.2d 522, the Supreme Court stated that the trier of fact is not limited in its deliberations to a consideration of that which is, strictly speaking, testimony, but that the trier of fact may consider any facts developed during the trial from which a reasonable inference may be drawn for or against either party.

The defendant's final contention is that the trial court failed to find that Carter Russell's in-court identification of

the defendant was untainted by the illegal and prejudicial line-up. It should be noted that there is no necessity that such a formal finding be made by the trial court.

Further, the record reveals that Russell had adequate opportunity to observe the defendant at the time of the shooting, which is corroborated by his subsequent photograph identification. Defense counsel recognized the strength of the photograph identification when he withdrew his motion to suppress as to that identification. The line-up identification occurred the day following the photograph identification, and therefore the in-court identification had a basis independent of the line-up confrontation. See People v. Nelson, 40 Ill.2d 146.

For these reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

GOLDBERG, P.J., and LYONS, J., concur.

25 I.A.3 431

71-151

UNITED STATES OF AMERICA

ABST.

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice
Honorable THOMAS J. MORAN, Justice
Honorable MEL ABRAHAMSON, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On May 17, 1972 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

Abstract

NO. 71-151

FILED

MAY 17 1972

HOWARD K. KELLETT, Clerk
Appellate Court, 2d District

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

vs.

ELMER CROSS,

Defendant-Appellant.

Appeal from the Circuit Court of the Nineteenth Judicial Circuit, Lake County, Illinois.

JUSTICE THOMAS J. MORAN DELIVERED THE OPINION OF THE COURT:

In a four count indictment, defendant was charged with the offenses of involuntary manslaughter and reckless homicide in violation of Ill. Rev. Stat. 1969, Ch. 38, Secs. 9-3 (a) and 9-3 (b). He plead guilty to one count of reckless homicide, and the State dismissed the balance of the counts. A combined hearing for probation and aggravation and mitigation was held, probation was denied and defendant was sentenced to a term of three to five years in the penitentiary.

The only issue on appeal is the propriety of the minimum sentence. Defendant contends that the three year minimum should be reduced because it is excessive and exceeds one-third of the maxiumum sentence.

The defendant's automobile, which he was operating while intoxicated, left its proper lane, drove across the roadway, over a lawn, through a fence and into a house, causing the death of a five year old boy who had been seated on his front porch steps.

The evidence shows that the forty year old defendant is married and the father of four children, that he pays monthly mortgage payments on the family home and that, while he has been employed at various jobs, his overall work record is fairly stable. Testimony by both defendant and his wife evidenced that defendant has had a drinking problem for some time.

Defendant's police record indicates 16 misdemeanor convictions dating back approximately fifteen years. A 1957 conviction for driving while intoxicated was followed by a discretionary revocation of his driver's license and, in 1958, while the revocation was still in effect, he was convicted of driving without a license. Additionally, he has been convicted of speeding, reckless driving, negligent driving and misdemeanor offenses of drunk and disorderly conduct and assault and battery which, it was testified, resulted from altercations between defendant and his wife. This is his first conviction for a felony.

Defendant first argues that the minimum sentence of three years is excessive and should be reduced "in view of his character and background, together with the current enlightened theories of institutionalized rehabilitation." The guidelines for reduction of sentence, set by the Supreme Court, stress that the trial court is generally in a better position to determine proper punishment. Reduction of sentences on appeal is limited to those instances where the punishment is at variance with the fundamental spirit of the law, or disproportionate to the offense. The People v. Fox, 48 Ill. 2d 239, 251-252 (1971); The People v. Stransberry, 47 Ill. 2d 541, 549 (1971); The People v. Nelson, 41 Ill. 2d 364, 368-369 (1968); The People v. Taylor, 33 Ill. 2d 417, 424 (1965). In the present case, the trial court was presented with adequate evidence on which to base its decision. The record reflects both the court's consideration of the mitigating circumstances of defendant's situation and its observation that defendant's record of repeated convictions for driving offenses demonstrated the lack of any attempt to rehabilitate himself. It was the trial court's considered opinion that, in this instance, the sentence imposed would act as a deterrent and better serve the purpose of rehabilitation. These

considerations were proper. Since there was no abuse of discretion by the court and since the sentence is proportionate to the offense, we find no basis on which to authorize a reduction. See, The People v. Spicer, 47 Ill. 2d 114, 119-120 (1970).

The second argument advanced by defendant is that the minimum sentence of three years is improper and should be reduced because it exceeds one-third of the maximum sentence. Aware, as we are, that the one-third formula has been advocated as a means of maintaining a proper span for the functioning of the parole system and rehabilitation, it is not currently the sentencing law of this State. See, Ill. Rev. Stat. 1971, Ch. 38, Sec. 1-7 (e); People v. Winston, 4 Ill. App. 3d 467 (2nd Dist., Gen. No. 71-170); People v. Miller, ___ Ill. App. 3d ____, 266 N.E. 2d 427, 430 (1971). Absent other considerations, a sentence will not be reduced merely on the ground that the minimum sentence is more than one-third the maximum.

For these reasons, the decision of the trial court will be affirmed.

JUDGMENT AFFIRMED.

Seidenfeld, P.J. and Abrahamson, J. - Concur

5IA3 458

71-241

UNITED STATES OF AMERICA

ABSTRACT

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, in the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable WILLIAM L. GUILD, Acting Presiding Justice
Honorable THOMAS J. MORAN, Justice
Honorable MEL ABRAHAMSON, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On May 26, 1972 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

NO. 71-241

Abstract

IN THE

THE APPELLATE COURT

OF THE SECOND JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. WILLIAM H. STEVENS, Defendant-Appellant.	)	Appeal from the Circuit Court for the 19th Judicial Circuit, Lake County, Illinois.

MR. JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT.

On September 21, 1970, the defendant, William H. Stevens, and a co-defendant were indicted by a grand jury of Lake County for the offense of burglary in that they on August 20, 1970 "...knowingly and without authority entered a building located at 2727 Belvidere Street, Waukegan, Lake County, Illinois, and occupied by Tom Peters Pontiac, Inc., an Illinois Corporation with the intent to commit therein a theft, in violation of Chapter 38, Section 19-1, Illinois Revised Statutes, of 1969;.."

On September 22 the court found Stevens to be indigent and appointed the public defender to represent him. A copy of the

indictment and a list of witnesses was furnished to him on that date and the cause continued until September 29 for arraignment. A plea of not guilty was entered on that date and the matter set for trial.

On November 24, Stevens withdrew his plea of not guilty and entered a plea of guilty to the offense of burglary as charged in the indictment and made an oral motion for probation. On February 5, 1971, a hearing was held on that motion with the stipulation that it would be in lieu of a hearing in aggravation and mitigation. At the conclusion of the hearing, the trial court denied the motion for probation and sentenced Stevens to a term of not less than one nor more than four years in the penitentiary.

On March 5, the defendant filed a notice of appeal and the Illinois Defender Project was appointed to represent him in the appeal. On October 13, the defender filed a motion to withdraw as counsel on the grounds that the appeal was without merit. A copy of that motion was furnished to the defendant together with our order that he file any additional matters that may have been meritorious in his behalf by November 15. Nothing further has been filed.

We have reviewed the record in detail and agree with the motion of the defender that there is no merit in the appeal. The indictment was in good form and the plea of guilty accepted only after the trial court had scrupulously followed the standards set forth in Supreme Court Rule 402. Ill. Rev. Stat. 1969, ch. 110A, sec. 402. The defendant was informed, on the record, as to the nature of the charge; the penalty that could be imposed; his right to plead not

guilty, confront his witnesses and to a trial by jury. The defendant indicated that he was satisfied with the representation afforded him by the public defender and that he understood all of his rights and that he had received no threats or promises to induce his plea. The court then made appropriate inquiry to determine the factual basis for the plea and was satisfied, as are we, that a sufficient basis did exist.

At the hearing on the defendant's motion for probation it was disclosed that he had been granted probation for one year in 1968 for criminal trespassing. In 1969, he was sentenced to 120 days at Vandalia for criminal damage to property. At the time of his arrest in August of 1970 there were two pending burglary charges against him.

The Criminal Code provides that a person may be admitted to probation when it appears that he ". . . is not likely to commit another offense." Ill. Rev. Stat. 1969, ch. 38, sec. 117-1 (a) (1). As is well known, the decision to grant or deny probation is one left within the sound discretion of the trial court and will not be disturbed on review unless that discretion is clearly abused. People v. Burdick, 117 Ill. App. 2d 314, 254 N. E. 2d 148, 152; People v. Smice, 92 Ill. App. 2d 83, 234 N. E. 2d 47, 48.

We are of the opinion that the denial of probation, under the circumstances, was well within the discretion of the trial court and that the plea of guilty was properly accepted.

Accordingly, the motion of the defender to withdraw will be allowed and the judgment below is affirmed.

LEAVE TO WITHDRAW AS COUNSEL GRANTED AND JUDGMENT AFFIRMED.

MORAN and GUILD, J. J., Concur.

5IA3548

(24540—4M—9-70) 160-o

STATE OF ILLINOIS

APPELLATE COURT

ABST.

AT AN APPELLATE COURT, for the Fourth Judicial District of the State of Illinois, sitting at Springfield:

PRESENT

HONORABLE HAROLD F. TRAPP, Presiding Judge

HONORABLE SAMUEL O. SMITH, Judge

HONORABLE LELAND SIMKINS, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 24th day of May A. D. 19 72, there was filed in the office of the Clerk of the Court an opinion of said Court, in words and figures following:

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

General No. 11628 Agenda No. 72-26

People of the State of Illinois, Plaintiff-Appellee vs. Raymond Benjamin Winchester, Defendant-Appellant	Appeal from Circuit Court Macoupin County

MR. PRESIDING JUSTICE TRAPP delivered the opinion of the court:

Defendant was convicted upon his plea of guilty to a charge of escape from a penal institution in violation of Ill. Rev. Stat. 1969, ch.38, par.31-6(a). Sentence of two to five years was imposed. Defendant appeals.

Counsel appointed in the trial court has moved to withdraw as such counsel and with the motion has filed a brief in conformity with Anders v. California, 386 U.S. 738, 18 L.Ed.2d 493. The record shows proof of service of such motion and brief upon defendant. This Court continued such motion for sixty days and defendant was notified that he might file further or additional points in support of his appeal. None have been filed.

We have examined the record and determined that the appeal

is without merit. At the date of the offense charged, defendant was being held in custody in the County Jail upon indictments charging, respectively, violations of Ill. Rev. Stat.,ch.38, par.12-6(a)(5) and par.16-1(b).

Defendant was appointed counsel and moved to withdraw his initial plea of not guilty and to plead guilty. The record discloses that defendant was thoroughly admonished in compliance with Supreme Court rules as to his right to a jury trial and the possible consequences of his plea of guilty; that defendant admitted the facts of the escape in open court and knew that the sentence which was, in fact, imposed would be recommended by the State's Attorney. The record contradicts any suggestion of coercion compelling the plea and there was a waiver of petition for probation and a waiver of hearing in aggravation and mitigation.

We have verified the conclusion of counsel that the fact that the charges pending at the time of the escape were dismissed and defendant was not convicted upon such charges does not make this conviction invalid. People v. Nastasio, 30 Ill.2d 51, 195 N.E.2d 144.

The motion to withdraw as counsel is allowed and the judgment below is affirmed.

AFFIRMED.

SIMKINS and SMITH, J.J., concur.

55537

ABST.

CHICAGO HEALTH CLUBS, INC., Plaintiff-Appellee, v. KASSIM Y. AHMAD, Defendant-Appellant.	)	APPEAL FROM CIRCUIT COURT, COOK COUNTY. Honorable James M. Bailey, Presiding.

MR. PRESIDING JUSTICE DIERINGER delivered the opinion of the court:

This is an appeal from a judgment of the Circuit Court of Cook County, entered by confession on a contract for $352.50.

The only issue on appeal is whether the trial court erred in holding the contract price was the plaintiff's measure of damages.

On February 7, 1970, the defendant, Kassim Y. Ahmad, entered into a contract with the plaintiff, Chicago Health Clubs, Inc., whereby the plaintiff sold and the defendant bought a membership in the plaintiff's gymnasium that entitled the defendant to use the gymnasium facilities for one year commencing with the date of the contract. The defendant agreed to pay the cash price of $259, plus the finance charge of $41, for a total of $300 in twelve monthly installments of $25 each, beginning March 7, 1970. The plaintiff was ready, willing and able to perform any services required by it under the contract, but the defendant neither used the facilities nor paid anything on the contract. On June 30, 1970, the plaintiff filed its complaint, and on July 9, 1970, the court entered a judgment by confession for $352.50 ($300 contract price, plus $52.50 attorney fees) and court costs. On August 5, 1970, the judgment was opened, and on September 11, 1970, the case was tried without a jury in the Circuit Court of Cook County. The defendant admits failure to pay on the contract. The court found the issues in favor of the plaintiff and confirmed the judgment by confession for $352.50, plus court costs.

The defendant suggests the burden was on the plaintiff to prove its damages. In his brief the defendant states:

> "The defendant admittedly prevented the plaintiff from performing in accordance with the contract. The plaintiff did not prove that it had incurred any costs with respect to the contract signed by the defendant on February 7, 1970. It therefore may recover only for the profit that it could have expected to have made on the defendant's contract. This profit was the contract price, which was proved, less what it would have cost the plaintiff to have provided the defendant with the services to which he was entitled under the contract, which amount was not proved."

Unquestionably, the measure of damages is the profit the plaintiff could have expected to realize on defendant's contract. The general rule of damages is that the person injured is to be placed in the position he would have been in had the contract been performed, but not in a better position. Manton v. Gammon, (1880) 7 Ill. App. 201; United Protective Workers of America, Local No. 2 v. Ford Motor Co., (1955) 223 F.2d 49.

In this case the profit is the total amount of the contract because any savings associated with the defendant's breach is negligible. Chicago Health Clubs, Inc. agreed to make its facilities available to the defendant in return for the contract price. It undertook no extra expense when the defendant signed the contract and realized no savings when he breached. In addition, the contract itself contained the following clause:

> "(L). Member shall not be relieved of his obligations to make any payment herein agreed to, and no deduction or allowance from any of said payments made, by reason of the absence or withdrawal of Member from the gymnasium, or by reason of member's failure to attend or use the gymnasium."

Furthermore, the burden was not on the plaintiff to prove damages beyond the contract price as the defendant suggests. Defendant's citation of Michigan cases for a contrary rule is not persuasive in the light of an Illinois case directly in point. The case of Dwyer v. Cashen, (1924) 232 Ill. App. 493, is very similar to the one at bar. In that case the defendant agreed to pay $100 for the use of a gymnasium and physical instruction and training for one year. The plaintiff proved he maintained such facilities but the defendant neither used them nor paid on the obligation. The defendant offered no evidence and moved for

judgment. The Appellate Court held that the measure of damages was the entire $100.

For these reasons the judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

BURMAN and ADESKO, JJ., concur.

Abstract only.

56296

ALICE ZAKER, Plaintiff-Appellant, v. THEODORE ZAKER, Defendant-Appellee.	)	APPEAL FROM CIRCUIT COURT, COOK COUNTY. Honorable Norman Eiger, Presiding.

MEMORANDUM OPINION

Pursuant to Supreme Court Rule 23

MR. PRESIDING JUSTICE DIERINGER delivered the opinion of the court:

This is an appeal from the Circuit Court of Cook County based on the findings of the trial judge following a post-decree hearing in a divorce action. The post-decree hearing was held to consider a motion requesting an increase in child support payments. The trial judge denied this motion.

We have considered the alleged errors but find none. The judgment of the trial court is not against the manifest weight of the evidence, and therefore we affirm the judgment of the Circuit Court.

AFFIRMED.

BURMAN and ADESKO, JJ., concur.

No. 56646

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, vs. ROBERT L. MANNS, Petitioner-Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. HONORABLE HARRY STARK, PRESIDING.

MR. PRESIDING JUSTICE McGLOON delivered the opinion of the court:

Defendant brings this appeal from the dismissal by the trial court of his amended post-conviction petition. The petition was dismissed after a hearing on the State's motion. In this appeal the defendant argues that the dismissal of his amended petition was improper because its allegations and supporting documents were sufficient to bring it under the purview of Ill. Rev. Stat. 1969, ch. 38, par. 122-1 and 122-2, thereby entitling him to an evidentiary hearing on the merits of his claim. The State argues that the dismissal upon its motion was proper because the petition does not meet the statutory requirements.

We affirm.

The facts necessary for disposition of the case are these: In December, 1966, the defendant was indicted for armed robbery in Kankakee County. In September, 1967, the defendant was charged in Cook County, in two indictments, with three counts of armed robbery. No contention was made that the indictments arose from the same course of criminal conduct. During a period of several months after his indictment, the defendant made a number of pre-trial motions in the Kankakee County Circuit Court, all of which were denied. Sometime during this period, although no exact date is specified in the pleadings, an arrangement was made between the prosecuting authorities of Cook and Kankakee Counties, and defense counsel in Kankakee, in which it was agreed that if the defendant would plead guilty to all charges in both jurisdictions, the State's Attorneys of both counties would recommend that the defendant be sentenced to five to ten year terms, all to run concurrently. Evidently, in reliance

upon this arrangement the defendant pled guilty to all charges in both jurisdictions and did, in fact, receive the recommended concurrent sentences.

In December, 1969, the defendant filed a post-conviction petition in Kankakee County alleging constitutional error in regard to those proceedings. That petition was dismissed. In January, 1970, the defendant filed a pro se post-conviction petition in Cook County alleging constitutional error in regard to his convictions in this county. Counsel was appointed to represent defendant and in October, 1970, an amended petition was filed. The amended petition was dismissed upon the State's motion and is now the subject of this appeal.

Defendant first argues that the constitutional validity of the Cook County convictions are wholly contingent upon the constitutional validity of the Kankakee conviction, because they were parts of the same prearranged sentencing agreement. Defendant's amended petition alleges, and documents, his claim that the denial of several of his pre-trial motions by the Circuit Court of Kankakee County was a violation of his constitutional rights. The defendant concludes that the existence of a mere unofficial agreement between authorities to recommend concurrent sentences upon defendant's guilty plea so bound the two proceedings together that the alleged constitutional error in Kankakee County tainted the proceedings in Cook County. A search of the record discloses that the only connection between the proceedings in the two jurisdictions was the fact that a sentencing arrangement was offered to the defendant. We find this tenuous connection between the proceedings to be insufficient to support the defendant's conclusion.

In People v. Ferree (1968), 40 Ill. 2d 483, 240 N.E. 2d 673, the Court said at page 484:

> Section 122-1 of the Post-Conviction Hearing Act is jurisdictional in nature and limits the subject matter reviewable under that Act. It provides, in pertinent part: "Any person imprisoned in the penitentiary who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the

> Constitution of the United States or of the State of Illinois or both may institute a proceeding under this Article." [Emphasis added.]

See also People v. Calhoun (1970), 46 Ill. 2d 60, 263 N.E. 2d 69. Since none of the allegations of constitutional violations raised in this part of defendant's amended petition occurred in the proceedings which resulted in his convictions in the Circuit Court of Cook County, they are not reviewable upon a post-conviction petition contesting the convictions in Cook County.

Defendant next alleges that his constitutional rights were violated in the Circuit Court of Cook County. He argues that he did not receive proper representation by his court-appointed counsel in that counsel did not make a sufficient investigation of the facts in the case so as to advise defendant as to the law in relation to those facts. However, the record discloses that defendant's attorney spoke to defendant's Kankakee counsel and in this conversation was informed of the sentencing arrangement. Counsel then conferred with the judge and later met with the defendant to confirm the arrangement. Further, the record shows that the defendant was properly admonished and voluntarily pled guilty to all charges in Cook County.

The amended petition is accompanied by an affidavit from defendant's appointed counsel which verifies the above facts and adds that no prior conference was had between the two because of defendant's incarceration in Kankakee County.

A post-conviction petition and its supporting documents must make a substantial showing that constitutional rights have been violated and allegations and conclusions to that effect are not sufficient to meet the requirements of Ill. Rev. Stat. 1969, ch. 38, par. 122-2. People v. Reeves (1952), 412 Ill. 555, 107 N.E. 2d 861; People v. Hysell (1971), 48 Ill. 2d 522, 272 N.E. 2d 38; People v. Sawyer (1971), 48 Ill. 2d 127, 268 N.E. 2d 689.

Defendant's amended petition and its supporting affidavit do not make a substantial showing that defendant's constitutional rights were violated and, therefore, the amended petition was

properly dismissed in the trial court.

Judgment affirmed.

DEMPSEY and McNAMARA, JJ., concur.

56474

IN THE MATTER OF THE APPLICATION OF THE COUNTY TREASURER AND EX-OFFICIO COUNTY COLLECTOR OF COOK COUNTY, ILLINOIS, FOR JUDGMENT AND ORDER OF SALE AGAINST REAL ESTATE RETURNED DELIQUENT FOR THE NON-PAYMENT OF GENERAL TAXES FOR THE YEAR 1969.	APPEAL FROM CIRCUIT COURT COOK COUNTY. HON. ROBERT J. DEMPSEY, Presiding.
* * * * *	
JOHN A. HUTTER and CLARA HUTTER, OBJECTORS-APPELLANTS.	

MR. JUSTICE BURKE delivered the opinion of the court:

An application was made in the Circuit Court by the County Treasurer and ex-officio County Collector of Cook County (hereinafter "County") for judgment and order of sale against real property, owned by John A. Hutter and Clara Hutter, which was returned deliquent for the non-payment of the 1969 general real estate taxes. The Hutters (hereinafter "objectors") filed Objection Number 40 to the application, alleging generally that the property in question received an excessive valuation by the Assessor of Cook County.

The County filed a motion to dismiss Objection Number 40, alleging (1) the objectors failed to exhaust their administrative remedies, in that they failed to file a complaint for review before the Board of Appeals, and (2) failed to pay the 1969 general real estate tax assessed against the property before filing the Objection, as required by statute. Objectors thereafter filed an "Opposition to Motion to Dismiss," alleging that they appeared at the offices of the Board of Appeals on five separate occasions seeking to file a complaint with regard to the 1969 tax but that they were ultimately told that the time for filing a complaint as to the 1969 tax had expired, and further alleging that they intended to pay

the sum of $1000 on account of the 1969 tax, which is the amount they believed the 1969 tax should have been.

The trial court entered an order dismissing Objection Number 40 on the grounds stated in the County's motion to dismiss, and objectors appeal.

Section 194 of the Revenue Act provides that any person wishing to object to all or to any part of a real property tax for any year, and for any reason other than that the real property is not subject to taxation, shall first pay all the tax installments due on that real property and shall also pay said installments under protest. Ill.Rev.Stat. 1969, Chap.120, Para.675.

The payment of the installments and the filing of a protest are mandatory, and failure to conform to the statute in this regard is fatal to an objection filed with regard to that tax assessment. (See generally, Burton v. Cain, 63 Ill.App.2d 183; People ex rel. Anderson v. Chicago & E. I. R. R. Co., 399 Ill. 520; People ex rel. City of Highland Park v. McKibbin, 380 Ill. 447.) In the instant matter Objection Number 40 contains no allegation that objectors paid the 1969 property tax, which omission is fatal to the Objection.

Objectors contend, however, that in their "Opposition to Motion to Dismiss" they offered to pay $1000 on account of the 1969 tax. It appears from the record that that amount represents less than one-sixth of the 1969 tax actually levied on the real estate in question. The statute, on the contrary, explicitly provides that any person wishing to object to a property tax "shall first pay all the tax installments due...." This contention is without merit.

Objection Number 40 also fails to allege that the objectors exhausted their administrative remedies by filing a complaint to

review the assessor's valuation before the Board of Appeals. See People ex rel. Brittain v. Outwater, 360 Ill. 621. This is likewise fatal to the Objection.

Objectors cite the case of People ex rel. Isbell v. Albert, 403 Ill. 469 as standing for the proposition that they may be heard on the question of the alleged excessiveness of their assessment by means of "tax objection procedure in the county court, notwithstanding that they did not complain before the Department of Revenue or to the board of review." The Albert case, however, states that the taxpayer may take advantage of the "tax objection procedure in the county court" where he has not had the opportunity to complain before the "Department of Revenue or to the board of review."

Objection Number 40 contains no allegation relating to whether objectors were in any manner hindered from filing a complaint before the Board of Appeals, and although their "Opposition to Motion to Dismiss" does allege that they were given a "procedural run-around" at the offices of the Board of Appeals when they allegedly appeared there to file the complaint as to the 1969 tax, there is no allegation that the objectors sought to compel a hearing by the Board by means of a mandamus action. See People ex rel. Brittain v. Outwater, 360 Ill. 621.

For these reasons the order of the Circuit Court dismissing Objection Number 40 is affirmed.

ORDER AFFIRMED.

GOLDBERG, P.J., and LYONS, J., concur.

5 I.A.3 698

71-73

UNITED STATES OF AMERICA

ABST.

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, in the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice
Honorable MEL ABRAHAMSON, Justice
Honorable WILLIAM L. GUILD, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On May 31, 1972 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

PUBL. ABST. ONLY

NO. 71-73

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ROBERT A. SCHLUTER Plaintiff Counter Defendant-Appellant -vs- AILEEN SCHLUTER Defendant Counter Plaintiff-Appellee	Appeal from the 18th Judicial Circuit Hon. Philip F. Locke Judge presiding

MR. JUSTICE GUILD delivered the opinion of the court:

The original complaint for divorce grounded on physical and mental cruelty was filed by the husband, and the wife subsequently filed a counter-complaint based on mental cruelty. After hearing numerous witnesses for both parties, the trial judge awarded the wife a decree of divorce, $200 per month alimony, custody of the child, and support for him in the amount of $400 monthly.

Dr. Robert Schluter seeks reversal of this judgment, contending it was against the manifest weight of the evidence to grant the decree of divorce in favor of his wife, that custody of the child should not have been granted to her without further investigation into a series of injuries to the child, that the amount ordered for child support is excessive, and that certain evidential rulings were erroneous.

The conflicting testimony concerning the grounds for divorce was given primarily by the parties themselves, although the husband's description of several incidents is corroborated by his mother who was present in the couple's home at such times, and the wife's description of several incidents concerns the same dates about which a neighbor testified, saying the mother and child came to her home crying, trembling and upset. For the

most part, the accusations of one party are flatly denied, justified, or reasonably explained away by the other.

Robert Schluter, a physicist who married Aileen at forty-one years of age, testified that his wife hit him several times when he was not looking, causing him to bleed, hit him while he was driving the car, while he was in bed, that she kicked him, pushed him, threw dishes at him, hit him with something like a fork and threatened him with a knife, but Aileen Schluter testified she had never deliberately hurt her husband, and had only pushed him in trying to close a door; "kicked his shin a little" as he stood within three inches of her saying "don't strike me", and when they were fighting, had put her hand against him stomach with no force behind it.

The husband also complained of sexual frustrations, his wife's sudden anger on various occasions, her throwing food and table utensils on the floor, calling him useless, expressing hatred of him and a wish he would die. He testified he had given his wife no provocation for these actions which caused him nervousness and interference with his work for which he consulted a psychoanalyst. He had first seen this doctor some years prior to his marriage for help with feeling shy and inarticulate, saw him forty to fifty times in 1970, and more frequently in 1969 as the visits cost $30 apiece and he spent $3,210 that year on his own psychoanalyst fees and travel. He also paid $8,000 in psychoanalyst fees for his wife over a period of four years.

Aileen Schluter testified her husband called her vulgar names, left the house in anger, accused her of being a rude hostess, and said she kept the apartment like a pigsty. According to her testimony, he talked to himself and withdrew into his study for three days while his mother was visiting them

simply because his wife had called his secretary to check on the date for a planned outing, refused to allow their child to be baptized and herself to attend her brother's wedding in Canada. She said he wrote obscene words on her appointment calendar and called her cousin a lesbian, which her husband denied. She said she had given no provocation for these actions and introduced into evidence notes which he had written of her telephone conversations, and he admitted having listened to several on a basement extension after the divorce action was approaching. Mrs. Schluter said she had no privacy, even being followed into the bathroom. She said the marriage was not consumated for thirteen months and that her husband refused to have intercourse with her for a period of time although she wanted a child. When she suggested they discuss their problems with a marriage counselor, her husband said counselors were "Mickey Mouse" and told her to get herself psychoanalyzed as it was not his fault. The effect of her husband's conduct, she said, was her constant need of help in the form of group therapy and medication prescribed by her doctor at some periods. She said she was tired and emotionally drained from struggling to cope with problems and the feeling that no part of her life was private.

It is contended on appeal that a divorce was needed, but granted to the wrong party and against the manifest weight of the evidence. While a clear case must be made to induce a court to grant a divorce on the application of the husband for physical cruelty of his wife, the same rules of law and evidence apply regardless of which one is the aggrieved party. A husband is entitled to a divorce for violent acts committed by his wife which produce pain and bodily harm, but when evidence concerning the conduct of both parties is sharply conflicting and the issues

depend largely upon matters of credibility, as they do in this case, the decision of the chancellor will not be disturbed unless it is manifestly against the weight of the evidence. Curran v. Curran 19 Ill.2d 164, 168, 169, 166 N.E.2d 13 (1960). His findings of fact will not be disturbed so long as they have a sufficient basis in the testimony. Dayan v. Dayan 86 Ill.App.2d 358, 359, 360, 229 N.E.2d 568 (1967), and are so manifestly against the weight of the evidence that they cannot stand, the reason being that the trial court has observed the witnesses and heard the conflicting testimony. Chambers v. Chambers 107 Ill.App.2d 456, 459, 246 N.E.2d 857 (1969). The record contains extensive testimony on a surfeit of unhappy details, which if believed, are a sufficient basis for the decree of divorce to the wife for mental cruelty; thus we cannot say the trial court abused its discretion in granting it.

Custody of the child is also disputed. There appears to be a persistent effort in the presentation of the husband's case to show that the wife had serious emotional problems resulting in physical injury, abuse, and danger to the child. It is now claimed the trial court erred by inadequately protecting the child's welfare in relying upon the testimony of the parties and failing to adopt the suggestion of Dr. Schluter's counsel made in final argument that the court order a further investigation and appoint a psychiatrist to examine both parties. No authority is cited for this unique argument, nor do we believe any is to be found. The more customary complaint concerning independent investigations by the court is that they violate the rights of the parties to due process of law. (See Williams v. Williams 8 Ill.App. 1, 130 N.E.2d 291 (1955), and cases cited therein)

The record contains testimony of a variety of injuries suffered by or purportedly inflicted upon the child by the wife. A reiteration of these would serve no useful purpose. It would appear that most if not all, of the injuries were accidental. Dr. Schluter photographed the injuries to the child and they were displayed to the trial court in this manner. However, the wife contended that they were all accidental and apparently the court so believed. It would appear that both parents were unreasonably apprehensive of the consequences, as the child was taken to the hospital or doctor for seemingly minor injuries where no treatment was required.

The plaintiff, Dr. Schluter, complains of certain rulings on the admissibility of evidence. It would appear from an examination of the record that the trial judge did in fact commit error in excluding certain evidence. Examination of the questions propounded and refused by the court, would not in fact constitute reversible error. For example, the trial court refused to let the doctor answer that the blows struck upon him caused him pain. If in fact he had been allowed to answer, obviously in the affirmative, the finding of the court would doubtless not have been any different. The evidence viewed as a whole is sharply conflicting, but as indicated above, this is within the province of the trial court.

The trial court ordered the husband to pay the sum of $400 per month for the support of a three year old child and $200 per month alimony. Evidence indicates that Dr. Schluter has a net annual income of approximately $14,000. With relation to the award of $400 per month for the support of a three year old child, attention is directed to the annotation found in 1 A.L.R.3d 382 pertaining to excessiveness of money

awarded as child support. This court is unable to find any case where this amount can be justified, considering the income of the husband and the age of the child. This court is cognizant that the trial court frequently adjusts the amount of the alimony and the child support to benefit one party or the other. In this case, the benefit would be to the wife who would receive $4,800 upon which she would not have to pay income tax. The husband on the other hand, would merely receive at the present time a deduction of $600.

Therefore, considering the income of the husband, the station in life of the parties, the fact that both married rather late in life, and further considering that no assets were divided or available for division between the parties, this court nonetheless feels that the sum of $400 per month for support of a three year old child is excessive. The support for the child is accordingly reduced to $200 per month.

The decree of the trial court providing for child support payments in the sum of $400 per month is therefore modified to provide for the payment of $200 per month, and as modified the decree is affirmed.

AFFIRMED AS MODIFIED.

P.J. SEIDENFELD and J. ABRAHAMSON Concur.

55362

5 I.A.3 736

GLORIA ANDERBERG, Administrator of the Estate of HELEN ANDERBERG, deceased,

Appellant,

v.

BERNARD NEWMAN and JERRY PORZENSKY,

Appellees.

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.

Hon. Ben Schwartz, Presiding.

ABST.

MR. JUSTICE McNAMARA delivered the opinion of the court:

Plaintiff brought suit against defendants to recover damages for the wrongful death of her mother. Defendants were doctors employed by the State of Illinois. The suit was in two counts: one in behalf of the estate, and the other on plaintiff's own behalf for her mental anguish and resulting illness. The complaint charged that the defendants acted negligently and wantonly in releasing plaintiff's mother from a mental institution maintained and operated by the State of Illinois, although both knew of the mother's suicidal tendencies; and that shortly after her release, the mother did commit suicide. Defendants moved to strike and dismiss the complaint. After hearing argument, the trial court granted defendants' motion to dismiss the suit. Plaintiff appeals.

Defendants argue that the suit is in fact against the State of Illinois and thus prohibited by Article IV, Section 26 of the Constitution of 1870 (then in effect). However, in certain instances, state employees have been held individually liable for negligent operation of public vehicles while in the course of their state employment. Hering v. Hilton, 12 Ill.2d 559, 147 N.E.2d 311; Creamer v. Rude, 37 Ill.App.2d 148, 185 N.E.2d 345; Pree v. Hymbaugh, 23 Ill.App.2d 211, 162 N.E.2d 297. Consequently, we do not decide this appeal on a constitutional prohibition against this kind of suit. Rather, we believe that under a well established principle, an immunity exists in favor of public officials when they are exercising their official discretion on matters which are discretionary in nature and not ministerial. Munson v. Bartels, 138 Ill. 322, 27 N.E. 1091; Lusiette v Kingan, 107 Ill.App.2d 239, 246 N.E.2d 24. Although the case of Molitor v. Kaneland Community Unit School Dist., 18 Ill.2d 11, 163 N.E.2d 89, abolished the

principle of governmental immunity, it did not affect the doctrine of public officials' immunity. Lusietto v. Kingan, supra.

The need for such immunity to public officials exercising their official discretion is apparent, and particularly so under the circumstances of the instant case. In Kelly v. Ogilvie, 64 Ill.App.2d 144, 212 N.E.2d 279, while commenting on the immunity of public officials, this court, at p.147, used language pertinent to the case at bar:

> "This doctrine rests on the principle that the public decision maker, like the judge, ought to be shielded from personal liability or other factors extraneous to a judgment based on his best perception of public needs."

And as our Supreme Court stated in Nagle v. Wakey, 161 Ill. 387, 43 N.E. 1079: "If the officer must answer out of his private fortune for what a jury may regard as a deficiency in judgment, men capable of filling the office, who have any property, would naturally avoid it," (p.392).

The decision of the defendant doctors to release plaintiff's mother from a state institution obviously was in the exercise of their official discretion. In the exercise of that discretion, defendants must be protected from individual civil liability. The trial court properly dismissed the complaint. The order of dismissal is affirmed.

Order affirmed.

McGLOON, P.J., and DEMPSEY, J., concur.

5 I.A.3 742

No. 55809

LESTER C. NEWTON TRUCKING COMPANY, INC., Plaintiff-Appellant, vs. SPECTOR FREIGHT SYSTEM, INC., Defendant-Appellee.	)))))))	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. HONORABLE NICHOLAS J. BUA, PRESIDING.

MR. PRESIDING JUSTICE McGLOON delivered the opinion of the court:

This is an appeal from an order of the Circuit Court assessing attorney's fees of $300 against plaintiff pursuant to Section 41 of the Civil Practice Act. Plaintiff argues that such fees were improperly assessed since there was no showing that the pleadings were made without reasonable cause, not in good faith, and found to be untrue.

We reverse.

On March 27, 1968, a collision occurred in Massachusetts between a vehicle owned by plaintiff and a vehicle operated by defendant. Plaintiff filed suit for property damage in Massachusetts on March 19, 1970. Because counsel was concerned that the lawsuit might not be perfected in Massachusetts before the two year statute of limitations expired, an identical lawsuit was filed in the Circuit Court of Cook County, Illinois, on March 24, 1970.

Although the Massachusetts suit was perfected, plaintiff did not dismiss the Illinois lawsuit, even though he had earlier agreed to do so. Finally, on September 15, 1970, defendant moved to dismiss the Illinois lawsuit and petitioned the court to grant attorney's fees pursuant to Ill. Rev. Stat. 1969, ch. 110, par. 41. Affidavits and memoranda were filed by the parties, and after a hearing on December 11, 1970, the Circuit Court ordered the Illinois lawsuit dismissed and awarded to the defendant $300 for attorney's fees under Section 41.

The statute in question reads as follows:

> §41. Untrue statements. Allegations and denials, made without reasonable cause and not in good faith, and found to be untrue, shall subject the party pleading them to

> the payment of reasonable expenses, actually incurred by the other party by reason of the untrue pleading, together with a reasonable attorney's fee, to be summarily taxed by the court at the trial.

Even a cursory examination of this statute indicates that the relief granted is contingent upon a showing that litigation is pursued upon allegations made without reasonable cause, not in good faith, and found to be untrue. This is obvious not only from the statutory language itself but from the numerous constructions given the statute by this Court. See Hearst Corp. v. Associated Trade Press, Inc. (1968), 98 Ill. App. 2d 360, 240 N.E. 2d 386.

The thrust of defendant's argument is that, although the action filed may initially have been reasonable and filed in good faith, when the purpose for which it was filed was accomplished (i.e. protection against the possibility that the Massachusetts lawsuit would not be perfected), the failure of plaintiff to voluntarily dismiss the Illinois lawsuit converted the lawsuit to one which was unreasonable, vexatious, and not pursued in good faith.

Thus, defendant seems to focus not upon the pleadings of a case when initiated (here the pleadings were accepted as true when filed), but rather upon the motivation of the pleader not only at the time litigation is commenced but at any time thereafter. Such an interpretation is clearly not warranted by the language of the Legislature, and a substantial demarcation from the statute as it now exists is the prerogative of the Legislature, not the judiciary.

Defendant's remedy was properly a motion to dismiss, and costs assessed under Section 41 of the Civil Practice Act should not have been allowed.

Judgment reversed.

DEMPSEY and McNAMARA, JJ., concur.

71-261

5 I.A.3 796

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

ABST.

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, in the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable WILLIAM L. GUILD, Acting Presiding Justice
Honorable MEL ABRAHAMSON, Justice
Honorable THOMAS J. MORAN, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On June 7, 1972 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

Abstract

NO. 71-261

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

vs.

WILLIAM A. BOKHOLDT,

Defendant-Appellant.

Appeal from the Circuit Court of the Eighteenth Judicial Circuit, DuPage County, Illinois

JUSTICE THOMAS J. MORAN DELIVERED THE OPINION OF THE COURT:

Defendant appeals his conviction after entering a plea of guilty to attempted rape.

Defendant was indicted for rape and deviate sexual assault. Counsel was appointed and a competency hearing found defendant competent. Thereafter, defendant entered a plea of guilty to the lesser included offense of attempted rape and was sentenced for a term of not less than 21 months nor more than 5 years. The Public Defender was appointed for the purpose of appeal and has filed a motion to withdraw alleging that there are no grounds for a meritorious appeal.

We have followed the dictates of Anders v. California, 386 U.S. 738. The appeal has been considered on the basis of the record, together with counsel's motion and accompanying brief. The record shows that the plea of guilty was entered following a

negotiated plea as provided by Supreme Court Rule 402. The court substantially complied with this rule. There is no question raised as to the sufficiency of the indictment.

Finding no error, the motion to withdraw is allowed and the judgment of the Circuit Court of DuPage County is affirmed.

MOTION ALLOWED; JUDGMENT AFFIRMED

Abrahamson and Guild, J.J. - Concur

71-239

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice
Honorable THOMAS J. MORAN, Justice
Honorable MEL ABRAHAMSON, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On June 13, 1972 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

No. 71-239

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

AERO-DYNE CORPORATION OF ILLINOIS, Plaintiff-Appellant, vs. ANDREW J. OMEL, Defendant-Appellee.	Appeal from the Circuit Court of the Eighteenth Judicial Circuit, DuPage County, Illinois.

PRESIDING JUSTICE SEIDENFELD delivered the opinion of the Court:

Aero-Dyne Corporation of Illinois, brought an action on a claimed contract of indemnity, seeking a judgment against three defendants: Andrew Omel, Robert Moffat, and Henry Hillary. The trial court entered summary judgment in favor of defendant Omel and against the plaintiff. Plaintiff appeals from that judgment contending that the pleadings raised an issue of fact as to the liability of the appellee to indemnify Aero-Dyne.

In January of 1965, defendants Omel, Hillary and Moffat and three other individuals, Fred Luschen, Raymond Piccony and William Hriszko, were the sole stockholders and directors of Perspectron, Inc. Each held one-sixth of the stock of the corporation which was primarily engaged in the performance of United States Government contracts. Moffat was president of Perspectron. Luschen and Piccony were the sole stockholders and principal officers of plaintiff, Aero-Dyne. Omel was the chairman of the board of Formwell Corporation, a major supplier to Perspectron. He apparently

had acquired stock in Perspectron some time in November or December, 1964.

Perspectron obtained its first government contract and approximately eighty percent of its subsequent government contracts by means of the device of placing the contract in the name of Aero-Dyne with all the work subcontracted to Perspectron by Aero-Dyne. This was done because Perspectron could not obtain the contracts in its name, since it had an inadequate financial history by government standards while Aero-Dyne could meet government requirements.

One contract involved in this litigation, referred to as the PNH-4 contract, was let according to the above procedure. The other contract involved, the ARA-25 contract, was let directly to Perspectron by the United States Government with a separate guarantee of Perspectron's performance by Aero-Dyne.

While Perspectron had the government contract, it had a shortage of cash and difficulty in securing credit. Prior to November of 1964, Omel had been approached about becoming a stockholder and Formwell Corporation accepting preferred stock in Perspectron in return for accounts receivable due from Perspectron.

During a mid-January meeting of the six stockholders (the exact date not being clear from the record) which was to effect a recapitalization of the company, along with the transaction of other business, a number of documents were signed by the six as individuals or as officers of the various corporations. Included was an agreement by Aero-Dyne and Formwell to convert a part of their receivables due from Perspectron into preferred stock. Also, the six stockholders contributed cash and a beneficial interest in a land trust to Perspectron in exchange for common stock. The beneficial interest under the land trust was sold by Perspectron to Hillary to acquire additional cash. Finally, the following

indemnity agreement, hereinafter referred to as Exhibit A, was signed by Omel, Moffat, Hriszko, and Hillary. The agreement stated:

January 14, 1965

Aero-Dyne Corporation of Illinois
3140 North Mannheim Road
Franklin Park, Illinois

Gentlemen:

> In order to induce you not to withdraw your guaranty of various contractual and financial obligations for Perspectron, Inc., an Illinois corporation, of which we are stockholders, and for other good consideration, we hereby jointly and severally agree to hold you harmless, and to protect and fully indemnify you from and against Two-Thirds (2/3rds) of all liabilities, costs, expenses, obligations, claims, demands and causes of action, whether groundless or otherwise, of every nature whatever incurred by or asserted against you at any time (expressly including without limitation Two-Thirds (2/3rds) of all attorneys' fees incurred by you in connection with any thereof) directly or indirectly arising out of or resulting from any and all contractual or financial obligations of or on behalf of Perspectron, Inc., presently existing or hereafter created.

The morning after the execution of this agreement, Omel met with Luschen and Piccony at Aero-Dyne's offices to discuss the agreement. Omel objected that the agreement did not incorporate a prior understanding between the three. Luschen and Piccony acknowledged that the agreement was too general and should not have included indemnification against all obligations, past and future. Luschen and Piccony stated that the agreement should be clarified. Omel obtained Aero-Dyne's copy of the indemnity agreement.

There are contrary assertions as to the content of the discussion between plaintiff's owners and Omel. Omel states that he advised Luschen and Piccony that it was his understanding that all six stockholders were to indemnify Aero-Dyne only on a lease and mortgage of Perspectron. Luschen asserts that after the three agreed that Exhibit A was too broad, they sat down and prepared a

specific itemization of the obligations to be incorporated in a modified indemnity agreement. Luschen contends that Omel approved the revision and it was his understanding that the revised indemnity agreement would be substituted for the original.

Omel either obtained the remaining copies of the agreement or tore his signature from them.

A revised indemnity agreement, hereinafter referred to as Exhibit B was prepared as follows:

January 14, 1965

Aero-Dyne Corporation of Illinois
3140 North Mannheim Road
Franklin Park, Illinois

Gentlemen:

In order to induce you not to withdraw your guaranty of the following contractual and financial obligations for Perspectron, Inc., an Illinois Corporation, of which we are stockholders, and for other good consideration, we hereby jointly and severally agree to hold you harmless, and to protect and fully indemnify you from and against Two-Thirds (2/3rds) of all liabilities, costs, expenses, obligations, claims, demands and causes of action, whether groundless or otherwise, of every nature whatever incurred by or asserted against you at any time (expressly including without limitation Two-Thirds (2/3rds) of all attorneys' fees incurred by you in connection with any thereof) directly or indirectly arising out of or resulting from the following contractual and financial obligations of or on behalf of Perspectron, Inc.:

1. Lease with American National Bank and Trust Company of Chicago, as Trustee under Trust Number 19032.

2. DA 18-119-AMC-536 (X)

3. N383 (19-383) 82449A

4. DA 18-119-AMC-01561 (X)

5. DA 18-119-AMC-01919 (X)

6. DA 18-119-AMC-01948 (X)

7. N383 (19-383 MIS) 86074A

Omel refused to sign Exhibit B on the grounds that it did not incorporate the original understanding of the parties that all six

stockholders were to indemnify Aero-Dyne only with regard to the lease and mortgage. The three remaining signatories of Exhibit A subsequently signed Exhibit B.

Subsequent to February 1, 1965, Aero-Dyne and the government modified the PNH-4 contract by supplemental agreements, increasing the K price over 30%. Perspectron accepted the changes. Omel denies having knowledge of such modifications or consenting to them.

Perspectron was ultimately adjudged bankrupt and Aero-Dyne completed performance on the PNH-4 contract.

Aero-Dyne seeks indemnity for various items of damages it claims to have incurred and which it considers within the agreement.

We first consider the defendant's argument that plaintiff's answer to defendant's motion for summary judgment did not comply with Supreme Court Rule 191, Ch.110A, Ill.Rev.Stat. 1967 because plaintiff in its unverified answer relied entirely on excerpts from the pre-trial depositions of Luschen, Moffat, Hillary, Omel, Hriszko and Piccony. Defendant also contends deponents' answers are not based on personal knowledge, are conclusionary and contain non-admissible statements.

Defendant failed to raise any objections to the answer and cannot raise them for the first time on appeal. Defendant has waived these objections. Scharf v. Waters, 328 Ill.App. 525 (1946); Campione v. Henry C. Lytton & Co., 57 Ill.App.2d 147 (1965); Classen v. Heil, 330 Ill.App. 433 (1947).

The initial failure of plaintiff's attorney to file an affidavit of certification of the excerpts of the depositions was cured sufficiently by his filing of such an affidavit on the day of the hearing on plaintiff's motion to vacate the summary judgment. In fact, this is the only record of proceedings that we have on appeal.

Plaintiff alleges error in that triable issues exist as to the relevant material facts necessary for a determination of the

liability of Omel, including (1) whether the indemnity agreement executed by Omel was canceled (2) whether the revised indemnity agreement conformed to the agreement of the parties (3) whether the original indemnity agreement was supported by consideration, (4) whether the six stockholders of Perspectron agreed that the indemnity agreement was to be signed by all stockholders rather than only four (5) whether the liability of Aero-Dyne on the PNH-4 prime contract is covered by the indemnity agreement and (6) whether the PNH-4 contract was materially modified without the knowledge or consent of Omel.

Plaintiff's theory in the trial court was that the destruction and surrender of Exhibit A will not discharge defendant's obligation to indemnify it because the document is merely evidence of the obligation and not the obligation. Plaintiff argues that the indemnity agreement was a unilateral contract: the promise of indemnity was in consideration of the exchange of Aero-Dyne's accounts receivable due from Perspectron for preferred stock of Perspectron; and that this consideration was sufficient as to the defendant because the relinquishment of a claim against a third party, Perspectron, is consideration for a new promise by another. Kling Bros. Engineering Works v. Whiting Corp., 320 Ill. App. 630 (1943); Plumb v. Campbell, 129 Ill. 101 (1888); Riddle v. LaSalle National Bank, 34 Ill.App.2d 116 (1902). Sec. 13, Williston on Contracts, 3d Ed. Plaintiff contends the purpose of the indemnity agreement was to equalize the risk among all the stockholders on the contracts and obligations contained in the revised indemnity agreement, and, in effect that the indemnity agreement is part of the refinancing plan for Perspectron.

Omel contends that there was never a meeting of the minds of the parties as to what should be covered by the indemnity agreement; that the agreement was not signed by all the parties it was

more than four signatures were intended. The trial court, therefore, erred in granting defendant-appellee's motion for summary judgment. We reverse and remand for further proceedings in accordance with this opinion.

Reversed and Remanded.

ABRAHAMSON and MORAN, J.J. concur.

5IA3831

(24540—4M—9-70) 160-o

STATE OF ILLINOIS

ABST.

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the State of Illinois, sitting at Springfield:

PRESENT

HONORABLE HAROLD F. TRAPP, Presiding Judge

HONORABLE SAMUEL O. SMITH, Judge

HONORABLE JAMES C. CRAVEN, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 12th day of JUNE A. D. 19 72, there was filed in the office of the Clerk of the Court an opinion of said Court, in words and figures following:

General No. 11368, 11429, 11483
Consolidated

Agenda No. 71-117

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

People of the State of Illinois, Plaintiff-Appellee vs. William Hoskins, Defendant-Appellant and State of Illinois, County of Pike, Pittsfield, Illinois, Plaintiff-Appellee vs. William Hoskins, Defendant-Appellant and In the Matter of the Estate of Maude Hoskins, deceased. Frances P. Palmer, Claimant-Appellee vs. William Burns Hoskins, Executor of the Estate of Maude Hoskins, deceased, Defendant-Appellant	Appeal from Circuit Court Pike County

MR. JUSTICE SMITH delivered the opinion of the court:

On motion we consolidated these three cases for opinion because their central theme is that at least two judges, two state's attorneys and three different attorneys employed by the defendant conspired together to deprive him of his statutory and constitutional rights. The defendant appeared pro se in the trial of each of the cases in the trial court and appears pro se here. Were the documents filed in this court prepared by an attorney, we would unhesitatingly strike them as failing in too many respects to comply with the rules of normal appellate procedure in the proper presentative of a case to this court. They also contain scandalous, impertinent and perhaps libelous matters. We have nevertheless elected and have carefully read and carefully consider the entire proceedings in these cases on their merits.

The defendant and his family reside on farm lands which were at one time owned by his mother and a portion of that land was condemned by the Sny Island Levee Drainage District and defendant's mother was awarded $7,000 in that proceedings. That award was not taken by the mother during her lifetime and after her death in 1969, the defendant was appointed executor of her will and an attorney employed by him collected the $7,000 on deposit with the county treasurer on behalf of the estate contrary to the defendant's wishes. The drainage district, its attorneys and its commissioners and the condemnation suit is the fountainhead of defendant's charges of political power, influence and control in Pike County and thus he reasons the results reached in these three cases are tainted.

agreed would sign; there was no consideration for the agreement; and the agreement was destroyed because it did not conform to the understanding of the parties.

The only question before us is whether there is any genuine issue as to any material fact and whether the defendant is entitled to judgment as a matter of law. Ruby v. Wayman, 99 Ill.App.2d 146, 150 (1968); Ill.Rev.Stat. 1969, ch.110,par.57. In determining if there is a genuine issue as to any material fact, inferences may be drawn from the facts which are not in dispute, and if fair minded persons could draw different inferences from these facts, then a triable issue exists. Peirce v. Conant, 47 Ill.App.2d 294, 300 (1964). In making this determination, the court must construe the pleadings, depositions, and affidavits most strictly against the moving party and most liberally in favor of the opponent. Solone v. Reck, 32 Ill.App.2d 308 (1961).

In the case at bar, it is clear that during January of 1965, Perspectron was in financial trouble. New stockholders had recently been brought into the corporation in the person of Omel and Hillary. The stockholders were engaged in a plan to recapitalize the company and add the new stockholders to the board of directors. There is a very real issue of fact of what was or was not included in the recapitalization plan. Whether Aero-Dyne guaranteed certain obligations of Perspectron and canceled certain accounts receivable as consideration for the claimed agreement for indemnity, as alleged by Aero-Dyne, is a triable issue of fact. Nominally, Aero-Dyne canceled certain accounts receivable in exchange for preferred stock of Perspectron. In view of the serious financial problems of Perspectron, this consideration, the actual worth of stock, may be viewed as illusory. Whether the first indemnity agreement then could be canceled by Omel's action is a question of fact not resolved by the pleadings and exhibits; as is the question whether

The defendant was tried in a bench trial on a charge of criminal trespass in violation of the provisions of Ill. Rev. Stat. 1969, ch. 38, par.21-3. The defendant and his neighbor met casually on a public road the morning of the incident and inquiry was made about some of the defendant's hogs. The neighbor, Shipley, told the defendant not to come upon his land as long as he lived there. While the neighbor was gone and in the afternoon of the same day around 4 to 4:30, defendant and one Thode came to Shipley's house and was met at the door by Shipley's brother-in-law. Inquiry was again made about the hogs and a search around the barn was made for them. When Shipley returned and learned of the incident he signed a verified complaint. Defendant was fined $25 and costs.

There is little question but that the record shows a violation of the statute. Defendant had been warned by Shipley about coming on his property and defendant ignored it. In justification throughout the trial of the case the defendant sought to establish that he was in pursuit of four sows and some shoats and had traced them to the Shipley farm. He undertook to bring out that he and his wife had traced these hogs through a part of the fence that Shipley was to keep up. The purpose of the statute in making certain acts of trespass punishable as crimes is as a deterrent to violence or threats of violence. People v. Goduto, 21 Ill.2d 605, 174 N.E.2d 385. The defendant does not deny receiving the notice to stay off the farm nor does he deny that he entered upon the farm after receiving such notice. This is the only issue properly tried in this case. As the court pointed out to the defendant during the trial, the issues of defective fences and

close pursuit of hogs were not issues properly involved in the trial. It is evident that the defendant was not in close pursuit of his four sows and shoats because there had been a discussion about them in the morning when the warning had been given. Notwithstanding this warning, the defendant elected to go on the Shipley land at a time when Shipley was not at home. The defendant elected to ignore the prescribed rules and the penalty imposed was justified by the facts and the fine imposed was not excessive. The trial court's conduct in explaining these matters to the defendant during the course of the trial should be categorized as painstakingly accurate and correct and the judgment justified.

No. 11429

The defendant was charged in one case with plowing over a levee maintained by Sny Island Levee Drainage District in violation of Ill. Rev. Stat. 1969, ch. 42, § 12-7 and in a second case with obstructing or injuring a drain contrary to the provision of the statute. He was fined $50 and costs on each of said charges. They were consolidated for trial and appeal.

The defendant's defense on each of these charges is that he had cultivated his farm the same way since the drainage district entered the picture in 1962 and thus the charges are barred by the statute of limitations and likewise that these charges were never filed against him for such conduct until during the summer of 1969 when he had an attorney request additional damages against the Sny Island Levee Drainage District. Another defense is that the $7,000 allowed in the condemnation proceedings in 1962 was

inadequate and had not been collected by him or his mother because he had purchased the property on January 1, 1958 by purchase contract and the trial court in the condemnation proceedings would not permit the contract to be offered in evidence to establish the value of the land. One of the commissioners called on the defendant to discuss the plowing and the obstructing of the ditch without any satisfactory results. The defendant employed an attorney after the filing of these charges who undertook to negotiate a dismissal of these suits. The commissioners in effect stated that if the defendant would clean out the ditch, restore the levee bank as it was and would agree not to repeat this obstruction they would request the State's Attorney to dismiss these charges. Defendant produced his attorney as a witness in his behalf and that attorney so testified. The attorney likewise stated that the defendant refused to do anything and with the permission of the court the attorney withdrew from the case prior to the trial and was subpoenaedby the defendant. The defendant now asserts that the attorney was working for the drainage district and not for him in the negotiations. It is clear that the defendant would not settle with the commissioners. There is little doubt from this record that the acts charged against the defendant were proved beyond a reasonable doubt and that the fines imposed were not exorbitant.

No. 11483

This is an appeal by the defendant executor of his mother's estate from a judgment of the probate court allowing a claim of Frances P. Palmer, a sister of the defendant, for $4,347 for

services rendered their mother during her lifetime. Three different attorneys represented the defendant during the course of the estate proceedings and up to the time of the hearing on this claim. One attorney withdrew as attorney for the executor, a second attorney prepared an answer denying generally and categorically the allegations of the claim and filed it but did not represent nor purport to represent the defendant in the trial of the claim. When the case was set for trial a third attorney examined the entire record and obtained a continuance and then suggested that the defendant obtain someone else to represent him. On the day set for trial the defendant appeared pro se, made a demand for jury trial and filed a counterclaim. In it he asserted the purchase by the defendant of the farm lands in 1958 from his mother for $33,000, asserted the condemnation by the drainage district of a portion of this land at a valuation of $19,500 instead of the contract purchase price of $33,000, the refusal of the defendant and of his mother to accept the $7,000 which the jury allowed in the condemnation suit, the filing of criminal complaints by the district against the defendant, refusal of attorneys to defend him contrary to defendant's interpretation of the evidence and the facts and charging that the political power of the Sny Island Levee Drainage District was brought to bear upon the attorneys, that there was a conspiracy among them and the various judges and the attorney for the drainage district to deprive this defendant of his contract price and his children of their rights under the contract and alleged total damages for $21,784. This counterclaim was not filed at the time the answer

to the claim was filed and was dismissed for that reason and for the further reason that it had no relevancy or bearing upon the Palmer claim. The jury demand was denied because it was not made until the day of the trial after several continuances and after the answer had been filed without such a request.

The trial court refused to continue the case to give the defendant further opportunity to obtain counsel. Before the beginning of the trial plaintiff's attorney, the trial judge and the defendant went off the record in conference in an effort to settle the issue. The record indicates that the plaintiff was willing to discount her claim somewhat, but that the defendant was not willing to even consider the matter without disposing of the many items contained in the counterclaim. It is transparently clear that there was no relationship between the plaintiff's claim for services rendered and any claim that this defendant had against the drainage district except the fact that the attorney for the drainage district and the attorney for the plaintiff in this case were one and the same. Out of this fact arose the accusation that the power and influence of the drainage district, its commissioners and the large land owner resulted in this conspiracy to deprive the defendant of his alleged rights. The claim of his sister was allowed in full; the answer filed against it was a categorical denial of liability without any specificity and actually raised no issue to try.

We feel constrained to say that the trial judges in these three cases displayed remarkable patience and a willingness far

beyond the call of duty to explain to this defendant his rights and to assist him in his defense. Each of the three cases were correctly decided. It is understandable that the defendant's unwillingness or refusal to cooperate with his own chosen counsel in the settlement of some of the issues and his lack of understanding of the issues involved in these three proceedings has undermined if not destroyed his ability to obtain or retain counsel.

On this record, it is understandable that a lawyer would be reluctant to argue or present the ill-founded arguments and evidence which the defendant sought to place in these records. His views on what is proper, appropriate or permissible are widely different from the procedures normally followed in the courtroom. They cannot be condoned by this court. They were properly curtailed by the respective trial judges in these cases without observable loss of any rights to this defendant. Accordingly, each of said judgments should be and they are hereby affirmed.

Judgments affirmed.

Trapp, P.J. and Craven, J. concur.

71-210

5 I.A.3 865

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss.
Second District)

ABST.

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, in the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable WILLIAM L. GUILD, Acting Presiding Justice
Honorable THOMAS J. MORAN, Justice
Honorable MEL ABRAHAMSON, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On JUNE 21, 1972 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following:

NO. 71-210

Abstract

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

vs.

WILLIE SMITH,

Defendant-Appellant.

Appeal from the Circuit Court of the 19th Judicial Circuit, Lake County, Illinois.

JUSTICE THOMAS J. MORAN DELIVERED THE OPINION OF THE COURT:

Defendant appeals his conviction after entering a plea of guilty to robbery.

Defendant was indicted for armed robbery and robbery, thereafter entered a plea of guilty to the offense of robbery, and was sentenced for a term of not less than 3 years nor more than 6 years. The Illinois Defender Project was appointed for the purpose of appeal and has filed a motion to withdraw alleging that there are no grounds for a meritorious appeal.

We have followed the dictates of Anders v. California, 386 U.S. 738. The appeal has been considered on the basis of the record, together with counsel's motion. The record shows that the plea of guilty was entered following a negotiated plea as provided by Supreme Court Rule 402. The court substantially complied with this rule. There is no question raised as to the sufficiency of the indictment.

Finding no error, the motion to withdraw is allowed and the judgment of the Circuit Court of Lake County is affirmed.

MOTION ALLOWED; JUDGMENT AFFIRMED

Abrahamson and Guild, J.J. - Concur

56869

5 I.A.3 977

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
v.
CHARLES COUNT,
Defendant-Appellant.

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.
Hon. Herbert R. Friedland, Presiding.

MR. JUSTICE McNAMARA delivered the opinion of the court:

After a jury trial, defendant was found guilty of armed robbery and sentenced to 30 to 60 years. On direct appeal that conviction was affirmed by this court. People v. Count, 106 Ill.App.2d 258, 246 N.E.2d 91. The case is now before us by appeal from an order of the trial court, dismissing, without an evidentiary hearing, defendant's amended petition filed under the Post-Conviction Hearing Act.

During defendant's trial for armed robbery, the trial court suspended the proceedings in order to conduct a hearing to determine defendant's competency to stand trial. After the competency hearing began, the judge interrupted the testimony of the State's first witness to inquire whether defendant intended to waive a jury for the competency hearing. Defense counsel stated that defendant wished to waive a jury. The court then asked defendant as to his wish in regard to a jury waiver, and the defendant replied that he wished to waive a jury. After hearing from the only witness presented, Dr. William Haines, Director of the Behavior Clinic, the trial court found that defendant was competent to stand trial. The jury trial resumed, and defendant was found guilty of armed robbery. The jury also found that defendant was sane at the time of the commission of the offense and at the time of the verdict.

Defendant contends that his constitutional rights were violated in that the trial court failed to appoint a guardian ad litem for him in the competency hearing; that the competency hearing was constitutionally defective because it was conducted without a jury; that the State's failure to file a written response to an amendment to defendant's amended post-conviction

petition constituted an admission that his constitutional rights had been violated; and finally that the trial court's dismissal of the petition was based upon a misrepresentation by the assistant State's Attorney.

Relying on People v. Scott, 326 Ill. 327, 157 N.E. 247, defendant first contends that the failure of the trial court to appoint a guardian ad litem for him in the competency hearing constituted a denial of due process. However, Scott is clearly distinguishable from the instant case. In Scott, defendant was found guilty of murder, and punishment was fixed at death. The jury also found that defendant had become insane. The State subsequently filed a petition alleging that defendant had recovered his sanity and asking that the judgment be executed. Defendant's attorney sought to be appointed as guardian ad litem for defendant. The trial court refused, and instead appointed a deputy clerk of its court as guardian. The guardian refused to sign a petition for a change of venue, and the court subsequently denied a motion for a change of venue. On review the court held that defendant, who was incarcerated under an order adjudging him insane, was entitled to the appointment of a non-hostile guardian ad litem. Nowhere in Scott is there any support for the proposition that, prior to any finding of incompetency, a defendant, who is represented by his privately retained counsel, is denied due process when the court, without request by the defense, fails to appoint a guardian ad litem. Since the absence of a guardian ad litem under such circumstances does not demonstrate a violation of defendant's constitutional rights, it is not reviewable under the Post-Conviction Hearing Act. People v. Derengowski, 44 Ill.2d 476, 256 N.E.2d 455.

Defendant next contends that the competency hearing was constitutionally defective because it was conducted without a jury. However, in People v. Shadowens, 44 Ill.2d 70, 254 N.E.2d 484, the court, at p.72, stated:

> This section of the statute which gives the right to have the issue of competency determined by a jury, also gives the defendant the opportunity to

> waive this right. In People v. Brown (1969), 43 Ill. 2d 79, 81, where the sole question before this court was whether a defendant may waive his right to a jury trial in a competency hearing, we held that: "The right to trial by jury guaranteed by the sixth amendment to the Federal constitution and by section 5 of Article II of our constitution does not extend to a hearing to determine the competency of a defendant to stand trial. [Citation omitted] Thus, defendant did not waive a constitutional right."

Since defendant had no constitutional right to a jury trial in a competency hearing, the matter is not reviewable under the Post-Conviction Hearing Act. People v. Derengowski, supra. Moreover, it is clear from the record that defendant voluntarily and understandingly waived his right to a jury trial in the competency proceedings.

We find no merit in defendant's contention that the State's failure to file a responsive pleading to an amendment to defendant's amended post-conviction petition constituted an admission that its contents were true. The State filed a motion to dismiss defendant's amended petition, and on the day of the hearing on the motion, defendant obtained leave to file an amendment alleging that failure to appoint a guardian ad litem in the competency hearing was a denial of due process. The prosecutor acknowledged receipt of the amendment, and stated that he would answer orally. The defense made no objection, and at the hearing on the petition, there was a thorough consideration of all defendant's pleadings, including the amendment. As we have noted, there was no constitutional right to the appointment of a guardian ad litem in the instant case. Moreover, defendant made no objection to the prosecutor's statement that he would answer the amendment orally, and in fact urges the issue for the first time on appeal. See Scales v. Mitchell, 406 Ill. 130, 92 N.E.2d 665.

Defendant finally argues that the dismissal of the post-conviction petition was based on a misstatement of the law by the prosecutor regarding the Supreme Court's holding in People v. Scott, supra. An examination of the record reveals that the trial court was familiar with the holding in Scott, and that it was not misled by any comments of the prosecutor. Additionally, as we have

observed, Scott is inapplicable to the instant case, and no comment about it could have been prejudicial to defendant.

For the foregoing reasons, the order dismissing defendant's post-conviction petition is affirmed.

Order affirmed.

McGLOON, P.J., and DEMPSEY, J., concur.

56127

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. RAYMOND BUSCH, Defendant-Appellant.	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. Hon. Chester Strzalka, Presiding.

MR. JUSTICE McNAMARA delivered the opinion of the court:

Defendant was charged with criminal trespass to a vehicle. Ill.Rev.Stat. 1969, ch.38,par.21-2. After a bench trial, he was found guilty of that crime and sentenced to one year in Vandalia. He appeals, contending that he was not proved guilty beyond a reasonable doubt. In such cases, this court is permitted to affirm the judgment of the trial court by means of a memorandum opinion if it is determined that no error of law appears, and that an opinion would have no precedential value. Supreme Court Rule 23(c). We have carefully reviewed the record, and we are satisfied that such a disposition is appropriate in the instant case.

It is undisputed that defendant did not steal the automobile in question. However, the State offered ample evidence to support the finding of the trier of fact that defendant knowingly and without authority entered and operated the automobile in violation of the Statute. Ill.Rev.Stat. 1969, ch.38,par.21-2. In a bench trial it is the duty of the trial judge to determine the credibility of the witnesses and the weight to be given their testimony, and unless the evidence is so improbable or unsatisfactory as to leave a reasonable doubt of defendant's guilt, the finding of the court will not be disturbed. People v. Reaves, 24 Ill.2d 380, 183 N.E.2d 169.

Since the evidence is not so unsatisfactory as to leave a reasonable doubt as to defendant's guilt, the judgment of the circuit court is affirmed.

Judgment affirmed.

McGLOON, P.J., and DEMPSEY, J., concur.

56501

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Respondent-Appellee,	)	APPEAL FROM THE CIRCUIT
	)	
v.	)	COURT OF COOK COUNTY.
	)	
EARL NETTLES,	)	Hon. Charles A. Barrett,
	)	Presiding.
Petitioner-Appellant.	)	

MR. JUSTICE McNAMARA delivered the opinion of the court.

Defendant was found guilty of unlawful possession of heroin on September 21, 1964, after a bench trial. The court sentenced defendant to a term of 5 to 25 years. On appeal, the conviction was affirmed by the Supreme Court. People v. Nettles, 34 Ill.2d 52, 213 N.E.2d 536. Defendant subsequently filed a petition under the Post-Conviction Hearing Act alleging the violation of certain constitutional rights at trial. The circuit court dismissed defendant's petition without an evidentiary hearing. Defendant contends that his petition raised substantial constitutional issues thereby requiring the court to hold an evidentiary hearing.

Defendant alleged in his post-conviction petition that his privilege against self-incrimination was violated at the preliminary hearing because he was not advised by the court of his right to remain silent before stipulating that the substance recovered from his person was heroin. Subsequently at trial, after the trial court's denial of defendant's motion to suppress the physical evidence, defense counsel stipulated that the substance was heroin. Defendant also alleged in his petition that defense counsel entered this trial stipulation without conferring with defendant because defendant had made the same stipulation at the preliminary hearing. Defendant thus contends that his counsel was so incompetent as to deny his constitutional right to counsel.

The purpose of the post-conviction hearing is to provide an independent remedy to prisoners whose constitutional rights were violated in the proceeding which resulted in their conviction. People v. Agnello, 35 Ill.2d 611, 221 N.E.2d 658. It is not within the purpose of the Post-Conviction Hearing Act to have claims

considered which could have been considered on a direct review of the conviction. People v. Armes, 37 Ill.2d 457, 227 N.E.2d 745. Therefore, where a person convicted of a crime has taken an appeal from the judgment of conviction on a complete record, the judgment of the reviewing court is res judicata as to all issues actually decided by the court and all issues which could have been presented to the reviewing court, if not presented, are waived. People v. Kamsler, 39 Ill.2d 73, 233 N.E.2d 415.

In applying these principles to the instant petition, it is clear that the circuit court properly dismissed defendant's petition without an evidentiary hearing. Defendant's claim that the trial court unconstitutionally violated his privilege against self-incrimination was not presented to the reviewing court in the direct appeal. The claim is, therefore, barred by waiver. Moreover, while a confession or admission made by defendant at a preliminary hearing without being informed of his right to remain silent is inadmissible at trial, People v. Rue, 35 Ill.2d 234, 220 N.E.2d 457, there is no allegation in defendant's petition that the stipulation agreed upon by defendant at the preliminary hearing was used by the State at trial. Indeed, defendant's petition itself indicates that the stipulation made at the preliminary hearing was not admitted into evidence at the trial. Since nothing that transpired at defendant's preliminary hearing appears to have been used against him upon his trial, defendant's privilege against self-incrimination was not violated. People v. Masterson, 45 Ill.2d 499, 259 N.E.2d 794.

Defendant's claim that he was unconstitutionally denied effective assistance of counsel was also properly dismissed by the trial court. The incompetency of counsel necessary to constitute denial of a defendant's right to counsel must be conduct of such defective character as to make the defense a farce. People v. Blackburn, ___ Ill.App.2d ___, 273 N.E.2d 472. The fact that counsel stipulated to part of the State's case does not demonstrate incompetency by which defendant can claim prejudice. People v. Dean, 31 Ill.2d 214, 201 N.E.2d 405.

In People v. Hare, 25 Ill.2d 321, 185 N.E.2d 178, the court refused to hold that defense counsel was incompetent, although he stipulated to all the elements of the State's case with the exception of a confession.

An examination of the instant record, both at trial and on direct appeal, reveals that counsel conducted an able defense. His decision at trial to stipulate that the substance possessed by defendant was heroin, even if made because of defendant's earlier admission, did not render counsel's representation constitutionally defective.

The trial court correctly dismissed the post-conviction petition without an evidentiary hearing. The order is affirmed.

Order affirmed.

McGLOON, P.J., and DEMPSEY, J., concur.

No. 56537

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. SAMUEL D. ROBINSON, Defendant-Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. HONORABLE FRANK J. WILSON, PRESIDING.

MR. PRESIDING JUSTICE McGLOON delivered the opinion of the court:

Defendant was indicted for murder, and at a hearing on January 23, 1968, he pled guilty to the charge and was sentenced to a term of 14 to 20 years in the Illinois State Penitentiary. Subsequently, he filed a pro se petition for post-conviction relief pursuant to Ill. Rev. Stat. 1969, ch. 38, par. 122-1. The substance of the petition is that the petitioner was coerced to plead guilty by threats from his court-appointed counsel, and, therefore, his plea was involuntary. Counsel was appointed to represent him in the post-conviction proceedings and filed a "Memorandum in Support" of defendant's petition. On the State's motion, the trial judge dismissed the petition without affording the defendant a hearing on the allegations in the petition. Defendant brings this appeal to contest that dismissal.

We reverse.

The required content of a post-conviction petition is set out in Ill. Rev. Stat. 1969, ch. 38, par. 122-2: "The petition shall identify the proceeding in which the petitioner was convicted, *** and clearly set forth the respects in which petitioner's constitutional rights were violated**** Argument and citations and discussion of authorities shall be omitted from the petition."

These requirements have been further articulated in the case law that has dealt specifically with the meaning of Ill. Rev. Stat. 1969, ch. 38, par. 122-2. The trial court shall examine the petition with a view to determining whether the allegations of fact, liberally construed in favor of the petitioner, and taken as true, make a showing of imprisonment in violation of the Federal or State Constitutions. People v. Jennings (1952), 411 Ill. 21, 102 N.E. 2d

824; People v. Rose (1969), 43 Ill. 2d 273, 253 N.E. 2d 456. The petition and supporting documents must make a substantial showing that constitutional rights have been violated, and allegations or mere conclusions to that effect will not suffice. People v. Arbuckle (1969), 42 Ill. 2d 177, 246 N.E. 2d 240; People v. Hysell (1971), 48 Ill. 2d 522, 272 N.E. 2d 38; People v. Sawyer (1971), 48 Ill. 2d 127, 268 N.E. 2d 689. Affidavits and other supporting documents can be excused where the violation complained of is raised by the petitioner's sworn statements and is borne out by the record. People v. Reeves (1952), 412 Ill. 555, 107 N.E. 2d 861.

In the instant case the defendant elected to stand on his pro se petition to substantiate his claim for post-conviction relief. In that petition defendant alleges that his appointed counsel "*** did admonish the defendant that should he demand his right to a fair and impartial trial by jury, that the petitioner would pay the reprisal of death in the electric chair, or the least 150 years behind the dim gray prison walls [sic]***" and that this admonishment "did compel the defendant to reluctantly enter his guilty plea." In other parts of the petition the defendant alleges his change of plea was the result of "mental duress."

In its motion to dismiss the petition, the State alleges that the defendant has not raised a question of constitutional violation that entitles him to an evidentiary hearing. As a part of its motion to dismiss the State included a transcript of the defendant's change of plea that discloses that the defendant was properly admonished by the trial judge before his plea of guilty was accepted. Although a plea of guilty waives all error not jurisdictional, it does not preclude inquiring into any violation of constitutional rights. People v. Shelton (1969), 42 Ill. 2d 490, 248 N.E. 2d 65; People v. Evans (1967), 37 Ill. 2d 27, 224 N.E. 2d 778.

It is clear that the pro se petition in this case, standing

alone, does not make the substantial showing of constitutional violation that is required by the statute. But a review of the entire record shows that the defendant's allegations are strengthened in two important respects.

The transcript of the change of plea hearing indicates that the defendant was informed of his right to a jury trial and told of the minimum and maximum sentences that could be imposed upon him. We find it significant, in light of defendant's allegation that his plea was coerced, that he was not asked if his plea was voluntary or the result of any threat or promise.

It also appears from the record that the defendant and two companions were indicted for the alleged offense. Upon arraignment, one attorney was appointed to represent all three defendants, and all three pled not guilty. What is significant is that at the time the petitioner changed his plea to guilty and was sentenced, he was represented by the same counsel who represented his two co-defendants who at that time persisted in their pleas of not guilty.

These two facts alone do not indicate that the defendant's constitutional rights were violated, just as an independent consideration of the petition does not show a violation of constitutional rights, but these facts, in light of the allegations in the sworn petition, do make the substantial showing that is necessary to entitle the defendant to an evidentiary hearing in the trial court.

Judgment reversed.

DEMPSEY and McNAMARA, JJ., concur.

55728

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

v.

WALTER OLIVER,
Defendant-Appellant.

Appeal from the Circuit Court of Cook County.

F. Emmett Morrissey, J.

MR. JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT:

Walter Oliver was indicted for armed robbery, tried by the court and found guilty. The evidence showed that Oliver, armed with a gun, robbed a gas station and two attendants after threatening them and forcing them to lie on the floor in a washroom. Oliver requested probation and a pre-sentence investigation was ordered.

The report revealed that five years earlier Oliver had been shot during the commission of a burglary. He was found guilty of criminal damage to property and placed on probation for one year with the first 30 days to be served in the House of Correction. After reading the report and conducting a mitigation and aggravation hearing, the court denied his application for probation and sentenced him from two years to two years and one day in the penitentiary — the minimum sentence possible for his crime. Ill.Rev. Stat., 1967, ch. 38, para. 18-2. He complains that the denial of his request for probation was improper, arbitrary and an abuse of the trial court's discretion.

There is no inherent, constitutional or statutory right to probation. Ill.Rev.Stat., 1967, ch. 38, para. 117-1(a); People v. Burdick, 117 Ill.App.2d 314, 254 N.E.2d 148 (1969). Granting or denying probation is within the discretion of the court. People v. Smith, 62 Ill.App.2d 73, 210 N.E.2d 574 (1965).

The court did not abuse its discretion in the present case. The judgment is affirmed.

Affirmed.

McGloon, PJ., and McNamara, J., concur.